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No. 730

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

WISCONSIN & MICHIGAN STEAMSHIP COMPANY,
Petitioner

vs.

CORPORATION AND SECURITIES COMMISSION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Wisconsin & Michigan Steamship Company prays that a writ of certiorari issue to review the decision or judgment of the Supreme Court of the State of Michigan entered in the above case on September 4, 1963, printed as Appendix "A"[1] p. 30, and on which timely application for rehearing was denied on October 9, 1963.

[1] Appendices "A" through "I" referred to herein are made a part of this petition.

I.

Citations to Opinions Below

a. The decision of the Supreme Court of the State of Michigan of which review is sought, printed as Appendix "A" hereto, p. 30, is officially reported in 371 Mich. Advance Sheets of October 3, 1963, p. 60 under the entitlement *Wisconsin & Michigan Steamship Company v. Corporation and Securities Commission*. The order denying the application or motion for rehearing, not printed, is Appendix "B" hereto, infra p. 42.

b. The administrative decision of the Michigan Corporation Tax Appeal Board, affirmed by the court below, is unreported and is printed in the Appendix for Appellant, in the court below, pp. 78a to 94a.[1]

II.

Jurisdiction

The decision of the Supreme Court of the State of Michigan was pronounced on the 4th day of September, 1963, and a timely Application for Rehearing was denied by the court below on October 9, 1963. The jurisdiction of this Court is involved under Title 28 U.S.C. § 1257 (3).

III.

Questions Presented

On the Merits:

Did the court below err in holding that the formula

[1] We file with this petition under provision of paragraph 1 of Rule 21, a certified copy of the record in the court below, including Appendix for Appellant, Appellant's exhibits 1 to 39 received in evidence at the hearing before the Corporation Board of Tax Appeals and filed in the Supreme Court appeal, and the Application for Rehearing in the Supreme Court of the State of Michigan, and the order of the Supreme Court of the State of Michigan denying the Application for Rehearing.

provided in Sec. 5c of the Michigan statute here in question [1] used by the Michigan Corporation and Securities Commission and Michigan Corporation Tax Appeal Board, in denying application of petitioner for a refund for the years 1952, 1953 and 1954 and in computing and determining the annual corporation franchise privilege fee or tax to be paid by Wisconsin & Michigan Steamship Company for the years 1956, 1957, 1958 and 1959, did not lay an unconstitutional or undue burden on interstate commerce conducted by Wisconsin & Michigan Steamship Company in violation of the Commerce Clause of the Constitution of the United States, Article 1, § 8(3)?

By this Petition:

Has the Supreme Court of Michigan decided a federal question of substance and importance not heretofore determined by this Court or in a way not in accord with applicable decisions of this Court?

IV.

Statute Involved

1. The statutory provision involved will be found in Pub. Acts. Mich. 1921, No. 85, Secs. 4 and 5, as amended by Act No. 183, Pub. Acts Mich. 1952, Secs. 5c and 5e thereof, added by Act No. 183 aforesaid (Mich. Stat. Ann. 1963 Cum. Supp. §§ 21.205, 21.208(3) and 21.208(5).) They are printed as Appendix "C" hereto, infra, p. 43.

a. Sec. 4, supra, requires each foreign and domestic corporation to pay at the time of filing its annual report with the Michigan Corporation and Securities Commis-

[1] Pub. Act Michigan 1921, No. 85, Sec. 5, as amended by Pub. Acts of Michigan 1952, No. 183, (Mich. Stat. Ann. 1963 Cum. Supp. § 21.208). Sec. 4, 5c and 5e of the statute are also involved and are printed as Appendix "C" hereto, infra, p. 43.

sion[4] an annual fee of 4 mills upon each dollar of its paid-up capital and surplus, subject to certain limitations. The measure of such tax is determined by formulae prescribed in Sec. 5c of the act as relates to carriers by water, supplemented and made mandatory by additional formulae prescribed by Sec. 5e, added to the act in 1952 by Pub. Act No. 183.

b. Sec. 5e prescribes in substance that the annual franchise fee imposed in Sec. 4, supra, shall be measured by the corporation's paid up capital and surplus as the sum of the tonnage of revenue passengers and revenue cargo first received or finally discharged by the carrier within this State is to the total of such tonnage so received and so discharged by such carrier within and without this State.[5]

c. Sec. 5e makes it mandatory that if an allocation factor used in the formula of Sec. 5e does not properly reflect the activity, business, receipts and capital of a taxpayer reasonably attributable to the state, the commission shall adjust the allocation factors in the manner prescribed. This the commission failed to do. Appellant's Exhibit 36, Appendix "I".

2. Validity of such provisions was tested in the court below by the Commerce Clause of the Constitution of the United States, Art. 1, §8(3) which vests in the Congress power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

---

[4] These annual reports are filed pursuant to Public Acts 1931, No. 327, Secs. 81 and 82 (Mich. Stat. Ann. 1963 Cum. Supp. Sec. 21.205).

[5] Such tax is construed as a franchise fee for the privilege of doing business within the state. This formula was struck down as violative of Article 1 Sec. 8(3) of the Constitution of the United States when applied to interstate commerce in the *Gartland* case, 339 Mich. 661, and the *Panhandle* case, 346 Mich. 50, certiorari denied by this Court, 352 U.S. 890, 77 S. Ct. 127, October Term, 1956 No. 354, and was not overruled as the Michigan Supreme Court indicated in the *Duluth* case, 353 Mich. 636.

V.

Concise Statement of the Case

Wisconsin & Michigan Steamship Company, petitioner, is a Wisconsin corporation admitted to do business in Michigan as a foreign corporation. The Michigan Corporation and Securities Commission respondent herein and the Michigan Corporation Board of Tax Appeals, constitute the administrative agency and quasi-judicial board, respectively, charged with proper determination of corporate franchise privilege fees to be paid the State of Michigan pursuant to the statutes involved.

Administrative Procedure:

For the year 1955 petitioner filed its annual report and paid the filing fee of $2.00 and the minimum fee of $10.00 under Sec. 4, as amended, by Pub. Acts Mich. 1952, No. 183 (Mich. Stat. Ann., 1963 Cum. Supp. 21.205 and 21.208(3) Sec. 5e.) In filing the Annual Report, petitioner, relying upon the decision of the Supreme Court of the State of Michigan in the *Gartland case*, 339 Mich. 661, excluded all interstate commerce and as it had done no intrastate business paid the minimum fee of $10.00, plus the filing fee of $2.00 under Sec. 4. Additional information was requested by respondent and supplied by petitioner, Appellant's Exhibit 4, the annual report for 1955, which showed that all passengers and cargo transported were transported in interstate commerce and that the company did no intrastate business for the period covered by the report. A determination was made of the tax by respondent on September 14, 1955, Appellant's Exhibit 14, petitioner being advised by respondent as follows:

"Wisconsin & Michigan Steamship Company
350 N. Plankinton Ave.
Milwaukee 3, Wisconsin

Gentlemen:

Your letter of September 9, 1955, received.

The ratio of tonnage received and discharged in Michigan to the total tonnage received and discharged is .49880.

The privilege fee is figured on the paid in capital of $232,200 and surplus of $2,510,741 at the rate of 4 mills on the dollar which results in $5,470.52 plus a filing fee of $2.00 for a total of $5,472.52.

Your remittance leaves a balance due the State of $5,460.52.

Kindly remit.

Very truly yours,
Ann Sawasky, Director
Profit Annual Reports"

A timely redetermination was requested by petitioner, Appellant's Exhibit 5,[1] in the Corporation Board of Tax Appeals, Appendix "D" herein. A redetermination was made by the Commissioner on January 6, 1956, Appellant's Exhibit 6, Appendix "E," which read:

"Foster & Meadows
Law Offices
Penobscot Building
Detroit 26, Michigan

Re: Wisconsin & Michigan Steamship Company
Franchise Tax 1955

Gentlemen:

It appears that the above named corporation had no intrastate commerce in Michigan during the period covered by the 1954 Annual Report, and that it is substantially in the same position as was Gartland Steamship Company with regard to activities in Michigan.

"Relying upon the Gartland case and the decision in

[1] Appellant's Exhibits 5, 6, 14, 15, 16 and 36 referred to by number were offered and received at the hearing before the Corporation Board of Tax Appeals and were a part of the record before the Supreme Court of the State of Michigan and because of their bearing on the administrative proceedings before the Corporation and Securities Commission, are made a part of this petition as appendices "D", "E", "F", "G", "H" and "I", respectively.

Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602, 71 S. Ct. Rep. 508, the Commission determines to accept the Reports as filed and determine the tax as paid.

Yours very truly,
James C. Allen
Commissioner"

Based on the decision of the redetermination of the tax by the Commissioner for the year 1955, petitioner, at the direction of the Commission, filed Supplemental Annual Reports for the years 1952, 1953 and 1954, Appellant's Exhibits 1A, 2A and 3A below, and thereafter filed an application for a refund for the overpayment of the franchise fees for those years. The letter of February 23, 1956, Appellant's Exhibit 15, Appendix "G," was considered by the Corporation and Securities Commission as an application for refund by Appellant's Exhibit 16, Appendix "H." Extended correspondence was exchanged between the attorneys for petitioner and respondent and it was not until May 10, 1960 that petitioner's application for refund was acted upon, Appellant's Exhibit 36, Appendix "I."

Appellant's Exhibits 7, 8, 9 and 10 were the Annual Reports for the years 1956, 1957, 1958 and 1959, all of which clearly disclosed that petitioner had engaged in no intrastate commerce, its business being 100 percent interstate commerce. Again, as in 1955 a $2.00 filing fee and a minimum franchise fee of $10.00 was paid at the time of filing the Reports for 1956, 1957, 1958 and 1959 and accepted by the Michigan Corporation and Securities Commission presumably in accordance with the ruling of Commissioner Allen as outlined in Exhibit 6, supra, and in accordance with the decision of the Supreme Court of the State of Michigan in the Gartland case, supra, and of this Court in the Spector

case 340 U.S. 602, 71 S. Ct. Rep. 508, as cited in the Commissioner's ruling.

Corporation Board of Tax Appeals—Proceedings

Following receipt of Appellant's Exhibit 36, Appendix "A," which was absolutely contrary to the ruling of Commissioner Allen, Exhibit 6 quoted above, and to the decision of the Supreme Court of the State of Michigan in the Gartland case, supra, and this Court's decision in the Spector case, supra, proceedings were commenced before the Corporation Board of Tax Appeals; one proceeding being for the refund of the overpayment of franchise fees for 1952, 1953 and 1954, and the other for the redetermination of the Corporation and Securities Commission's computation of franchise fees assessed for the years 1956, 1957, 1958 and 1959, Appendix for Appellant in the court below pp. 11a to 15a.

The consolidated cases came on for hearing before the Corporation Board of Tax Appeals on May 11, 1964. There was received in the proceedings a total of 29 exhibits.

Exhibits 1, 2 and 3 were the Annual Reports for the years 1952, 1953 and 1954 and Exhibits 4A, 5A and 6A were the Supplemental Annual Reports filed for those years.

Respondent's only witness called before the Corporation Board of Tax Appeals was Miss Ann Sawasky, Director of the Michigan Annual Report Section of Michigan Corporation and Securities Commission. She was called as a witness by the Assistant Attorney General for respondent. Her testimony appears on pp. 40a to 58a in the Appendix for Appellant in the court below. Miss Ann Sawasky's testimony Appendix for Appellant at pp. 32a, 33a and 41a:

"BY MR. FOSTER:

Q. And the 1952 tax was reassessed on the basis of so many mills on paid in capital and surplus?

A. That is correct.

Q. And that was despite the fact that the Wisconsin and Michigan Steamship Company was a Wisconsin corporation?

A. That is correct.

Q. Now you followed that same procedure, the Commission did, in assessing taxes against the Garland Steamship Company, did you not?

A. Yes, we did.

Q. And the Supreme Court, in 339 Michigan 661, said that you were entirely wrong, did they not?

A. That is correct.

Q. And said that the basis on which you could tax a foreign steamship company doing business in Michigan was only upon its intrastate business.

A. That is right.

Q. And that the Gartland Steamship Company case, as far as your Department knows, has never been reversed?

A. No, it has not.

Q. No. And the pending cases, the application for refund for 1952, 1953 and 1954, was held in for a very long time in your Department pending the outcome of the Panhandle case, [illegible]

A. I think that was one of the reasons, Mr. Foster.

Q. Yes. And the Panhandle case was finally decided and reversed in the Supreme Court?

A. That is right.

Q. And so was held pending the outcome of the Duluth, South Shore and Atlantic case?

A. That is right.

Q. And the Duluth, South Shore and Atlantic case was finally decided?

A. Yes.

Q. And the method by which your Commission redetermined the taxes due for the years 1956

Panhandle Eastern Pipeline Co. v. Corporation and Securities Commission, 346 Mich. 70.

Duluth, South Shore and Atlantic Railroad Co. v. Corporation and Securities Commission, 353 Mich. 636.

through 1939 was exactly contrary to what the Supreme Court said in the Gartland case, was it not?
A. Yes."

Mr. Otis Smith, Auditor General, and a member of the Corporation Board of Tax Appeals, which by statute is made up of the Auditor General, State Treasurer and Attorney General or an Assistant Attorney General, called Mr. Miles McKee, Resident Agent in Michigan and a Vice-President and Director of petitioner and his testimony is found on pp. 59a through 74a of the Appendix for Appellant in the court below. Findings of Fact, Conclusions of Law and Decision of the Appeal Board which upheld the Michigan Corporation and Securities Commission were filed January 25, 1962. Appendix for Appellant in the court below, pp. 78a to 94a.

Michigan Supreme Court Proceedings:

A timely general appeal was taken directly to the Supreme Court of the State of Michigan from the decision of the Corporation Board of Tax Appeals, as provided by statute. An Appendix for Appellant was filed together with appellant's Exhibits 1 through 39, which were part of the record before the Corporation Board of Tax Appeals. The brief on appeal for appellant sets forth under 1:

STATEMENT OF QUESTIONS INVOLVED.

1. **Did the Michigan Legislature intend that tons of cargo loaded on board or unloaded from vessels of Wisconsin & Michigan Steamship Company in Michigan ports, and which cargoes were transported solely and exlusively in interstate commerce between such ports and ports of other states, should be included in the numerator of the ratio for allocating paid-in capital and surplus of Wisconsin & Michigan Steamship Company for purposes of determining the amount of franchise fee due to the**

State of Michigan from Wisconsin & Michigan Steamship Company for the years in controversy?

Wisconsin & Michigan Steamship Company contends that the question should be answered, "No."

2. **If the answer to the first question is "Yes," does the inclusion of cargoes loaded and unloaded in Michigan ports and transported solely and exclusively in interstate commerce violate the Commerce Clause (Article 1, Section 8) of the Constitution of the United States?**

Wisconsin & Michigan Steamship Company contends that the question should be answered, "Yes."

The case was argued before the Supreme Court of Michigan on November 9, 1962. Early in January 1963, there having been a change in the membership of the Supreme Court of the State of Michigan, a request was made that the case be re-argued. The case was re-argued in the Supreme Court of the State of Michigan on June 4, 1963, and the decision of the Court Appendix "A") was handed down September 4, 1963. The Application for Rehearing was denied October 9, 1963. This petition for a writ of certiorari follows.

VI

REASONS FOR GRANTING THE WRIT

It is the position of petitioner (1) that in both the Corporation Board of Tax Appeals and the highest court of the State) there was drawn into question the validity of Sec. 4, 5, 5c and 56 of the statute involved on the grounds that as applied to petitioner it was repugnant to the Commerce Clause. The Corporation Board of Tax Appeals held to the contrary and was affirmed by the Supreme Court of the State (28 U.S.C. 1257(3)). Thus, the Michigan

Supreme Court has decided a federal question of substance within Rule 19(a); (2) that the precise questions presented have not been determined by this court and if any of its decisions bear thereon the court below has decided it in a way not in accord therewith; and (3) that quite apart from the direct interest of the respective parties, as pointed out in the Application for Rehearing filed in the court below, it is of vital importance to other litigants and parties[9] and to the taxpayers of the State of Michigan as well as to Michigan's system of taxation as a whole that the question presented be decided finally by this Court[10].

1. The court below, in its opinion, Appendix A, p. 30, stated:

> "Appellant does not claim that the State seeks to impose a tax upon it, a foreign corporation, for the privilege of conducting its interstate business in Michigan. Nor does the State claim in this case that it could do so lawfully."

Much to the contrary petitioner has claimed from the time it asked for a redetermination of the franchise tax for the year 1955 that respondent was seeking to impose a tax upon it for conducting interstate business between Muskegon, Michigan and Milwaukee, Wisconsin, see appellant's Exhibit No. 5, Appendix "D" to this petition and petition on appeal; Appendix for Appellant in the court below, paragraph 5, sub-paragraphs 1 and 2, pp. 3a and 4a. It is equally clear from the record and pleadings (see answer of respondent to petition of appeal, paragraph 5, sub-para-

[9] Application for Rehearing, pp. 21, 22 and 23, Appendix C herein.

[10] There has been certified to this court by the Clerk of the Supreme Court of the State of Michigan, Appendix of Appellant below, the 39 exhibits received at the hearing before the Corporation Board of Tax Appeals, the opinion of the court below, the Application for Rehearing filed in the court below and the order denying the Application for Rehearing in the court below. For the purpose of this petition the page number references to the decision of the court below will be as shown in Appendix "A."

graphs (1) and (2), p. 8a of Appellant's Appendix in the court below, that respondent has claimed that it can lawfully use, under Sec. 5c, the ratio of tonnage first received and finally discharged in Michigan, irrespective of the fact that all such tonnage was in interstate commerce. The record is clear that petitioner's business was 100 percent interstate commerce and that Sec. 5c(1) relating to carriers by water was subject to the provisions of Sec. 5e.

The court below has decided the case as though Secs. 4 and 5e of the Michigan statute do not exist. No consideration whatever has been given by respondent to adjust the formula of Sec. 5 so as to effect a fair and proper allocation according to the receipts, activity, business and capital reasonably attributable to the State of Michigan.

In *Gartland*, 339 Mich. 661, a case directly on point with the exception that in *Gartland* the corporation engaged to some small degree in intrastate commerce whereas petitioner here engaged in no intrastate commerce, its business being 100 percent interstate, the unanimous opinion of the court ruled against respondent's computation of the tax which was computed similarly to that of petitioner. At page 674:

> "It is the opinion of this Court by the enactment of * * *, the legislature gave to the commission the right and duty to apply a method of determining Gartland's tax calculated to effect a fair and proper allocation according to the receipts, activity, business and capital reasonably attributable to this state."
>
> "The order and opinion of the Corporation Tax Appeal Board affirming the computation of the commission is reversed, and the commission is directed to recompute the annual privilege fee of Gartland Steamship Company, a Delaware corporation, ex-

cluding any and all cargoes transported in interstate or foreign commerce."

In *Panhandle* 346 Mich. 50, certiorari denied by this court 352 U. S. 890, 77 S. Ct. 127, where the question was again considered, the opinion of the Michigan Supreme Court at page 56 reads:

> "* * * In our opinion it is clear that the formula used by the Commission includes receipts from a business not related to plaintiff's intrastate business, and under the authority of the Gartland case, supra, it is arbitrary and imposes an unjust burden upon interstate commerce * * *."

In *Duluth*, 353 Mich. 636, the question was again reviewed and the court in effect affirmed both Gartland and Panhandle. In this case Duluth engaged in extensive intrastate commerce within Michigan and the case was distinguished on this basis. At page 664 we read:

> "Both of these cases may be distinguished from our case on their facts. Gartland had no property in Michigan and did what the court apparently regarded as only an inconsequential intrastate business in Michigan. Over 90% of Panhandle's pipeline, properties and activities were located outside of Michigan. * * * Neither case involved the identical formula objected to here. And in both cases, this court, while rejecting the specific formula, upheld the right to levy the tax and ordered recomputation under Section 5e to achieve a reasonable result.
>
> "It is obvious that what the state offered in service and protection to the Gartland and Panhandle taxpayers in return for the tax was substantially different (particularly in the Gartland case) from the fact situation considered herein.
>
> "* * * Both Gartland and Panhandle opinions, however, relied upon *County* v. *Mountain States T & T Co.* 249 U.S. 384 (55 S. Ct. 477, L. Ed. 934) for constitutional authority. Both failed to distin-

guish between the direct taxation of interstate commerce (which Cooney ruled out) and the employment of an interstate commerce factor in the formula for determining the amount of paid-up capital and surplus to be allocated to Michigan in computing the fee to be assessed for doing intrastate business in Michigan.

* * *

"We now limit the application of the opinions in Gartland and Panhandle and hold that there is no constitutional barrier to the use of an interstate commerce factor in the allocation formula for determining the portion of paid-up capital and surplus allocable to Michigan for computation of a franchise tax for the right to carry on intrastate business in Michigan, where, as here, there is no showing that such formula reaches an unreasonable or discriminatory result."

It is abundantly clear that the limitation recited above in no way diminished or limited the application of the Gartland and Panhandle opinions to a taxpayer engaged wholly in interstate commerce. If anything, it buttressed the opinions. The limitation of the opinions pertains to a taxpayer engaged in intrastate commerce within Michigan. Petitioner engaged in no intrastate commerce in Michigan hence the opinions, as limited, are quite inapplicable. On the contrary without any intrastate commerce in Michigan, there leaves only the interstate commerce of the petitioner on which the tax could be based. This would clearly constitute then a direct tax on interstate commerce which the court in Duluth, supra, still pointed out was ruled out by *Cooney* v. *Mountain States T & T Co.*, 294 U. S. 384.

The Legislature has enacted the legislation and the courts have spoken clearly and succinctly on its application to a foreign corporation engaged solely and exclusively in interstate commerce.

The court below in its opinion, Appendix A, pg. 36 stated:

> "In the Duluth case, 353 Mich. 636, however, this Court severely limited the opinion in Gartland and Panhandle and realistically considered, overruled their holding to the extent that they could be construed to mean what appellant claims for them here."

Petitioner's only claim for Gartland and Panhandle was that interstate commerce should, under Sec. 5e, be excluded. Panhandle, on the basis of Gartland, so held and this Court denied certiorari in Panhandle, 352 U. S. 890, 77 S. Ct. 127 October term 1956, No. 354.

If, as the court stated, Duluth, realistically considered, overruled the decisions of the court below, specifically in Gartland and Panhandle, to the extent that they could be construed to mean what appellant below and petitioner here claimed for them, then the Michigan Supreme Court has completely reversed the Gartland and Panhandle decisions and rendered a decision absolutely contra to the numerous cases of this court which has, on several occasions, considered the various aspects of the right of a state to impose a franchise or privilege tax on a foreign corporation for the right to do business within a state.

(a) By the failure of the court below to recognize that the use of the formula under Sec. 5e by respondent without adherance to the mandate of Sec 5 directing that the formula must be computed or calculated so as to effect a fair and proper allocation according to the receipts, activity, business and capital reasonably attributable to the state, the precise federal question as to whether such action resulted in an undue burden upon interstate commerce in violation of the Commerce Clause was distinctly and unmistakably raised.

(b) Petitioner freely admits that in 1941 it applied for

admission to do business locally within the state and was granted that privilege. It is because of this fact that petitioner also admits it is subject to the payment of the statutory minimum fee of $10.00 annually plus the $2.00 filing fee. This being due whether it exercises the privilege of engaging in business *within* the state or not. The fact is clear, however, that petitioner has been engaged solely in interstate commerce and has not engaged in local business within the state since 1941 and particularly for the years in question here. Any further assessment of privilege fees for the right to do business within the State of Michigan must rest squarely on whether petitioner did in fact engage in such local or interstate business because the assessment of additional fees over and above the statutory minimum must bear a reasonable relationship to the receipts, activity, business and capital reasonably attributable to the state. If it did no business within the state then only the minimum fee, as established by the statute is assessable. The court below has completely disregarded this aspect of the matter. In drafting the statute the legislature clearly recognized that the formula provided in Sec. 5c standing alone would be stricken as violative of the Commerce Clause and an undue burden on the privilege of engaging in interstate commerce. For this very cogent reason it added Sec. 5e which clearly and unequivocably directs the Commission to adjust the formula by excluding one or more of its factors in order to effect a fair and proper allocation according to the receipts, activity, business and capital reasonably attributable to this state.

If, in the application of the formula of Sec. 5c, it appears petitioner did not engage in business locally or interstate business within the state then Sec. 5e must be considered to make the formula just and equitable. Excluding from the

formula of Sec. 5c all of petitioner's interstate business there can be no further tax other than the minimum provided by the statute. The purpose of Sec. 5c was to assure that the formula of Sec. 5c be calculated to effect a fair and proper allocation according to the receipts, activity, business and capital reasonably attributable to the State of Michigan. If as here, petitioner engaged in no local or intrastate business within the state, how can it be said the formula of Sec. 5c as evoked by respondent and upheld by the court below did not impose an unjust burden on petitioner's only business which was wholly interstate in nature. It clearly cannot.

(c) In the Panhandle decision of the court below it stated in no uncertain or ambiguous language, that in using the formula of Sec. 5 of the statute, the state agencies placed a tax on interstate business done by Panhandle, and that they could not so increase the amount of the privilege tax involved. The judgment of the court in the Panhandle case followed the opinion by ordering the state agencies to exclude from their computation of the tax "any and all receipts" of Panhandle "derived from the interstate sale in the State of Michigan of natural gas transported by it in interstate commerce through its pipelines from points outside the State of Michigan". Thus the effect of the court's judgment was to hold that Sec. 5, as applied, violated the Commerce Clause. In denying certiorari of the Panhandle decision, 346 Mich. 50, this court was in full accord with the decision of the court below.

The instant case, although involving a water carrier and Sec. 5c, which is identical to Sec. 5 in the Panhandle case, falls full square within the decision of the Panhandle case. Without the qualifying factors of Sec. 5c to achieve a reasonable result based upon activity reasonably attribu-

table to the state, the formula of Sec. 56, standing alone, continues to violate the Commerce Clause and the clear holdings of this court.

(3) The opinion and final judgment of the court below, 371 Mich. 61, was explicit in considering the federal question raised involving Section 56 of the statute as applied to petitioner. Headnotes 2, 3, 5 and 6, as well as the court's statement at page 67 that the cases of *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (71 S. Ct. 508, 95 L. ed 573); *Crandall* v. *Mountain States Telephone and Telegraph Co.*, 294 U. S. 384 (55 S. Ct. 477, 79 L. ed. 934) among others are inapposite to determination of the validity of the privilege fee sought to be charged to petitioner here, clearly consider the legal constitutional principles based upon the Commerce Clause. In so doing, the Supreme Court of Michigan has decided a federal question of substance unquestionably contra to the dictates of this court.

2. Insofar as the merits of the controversy are concerned, it is petitioner's position that the state, through its legislative agency, respondent here, is prohibited by the Commerce Clause from including receipts or property derived from or used in interstate commerce in the formula used to measure a corporate privilege fee for a foreign corporation who has qualified to do business within a state. This being particularly true where the foreign corporation is not engaged in any local or intrastate commerce within the State of Michigan. To do so is arbitrary and unreasonable and a discriminatory result is achieved and an undue burden is placed on interstate commerce. It is likewise true that when a foreign corporation qualified to do business in Michigan engages in both intrastate and interstate commerce and such can be realistically separated *only* the

intrastate commerce may be used as a basis for the assessment of a privilege fee or tax.

Where as here, however, petitioner engaged in no local or intrastate commerce and still the respondent persists in using the interstate business of petitioner in computing franchise fees over and above the minimum provided by the statute and which bear no relation whatever to business done within the state, then there can be but one inescapable conclusion, namely: an arbitrary and unreasonable result is achieved and the only business being taxed is interstate commerce. This result has been stricken repeatedly by this court, as repugnant to the Commerce Clause of the Federal Constitution.

(a) The issue, as it applies to foreign corporations engaged solely in interstate commerce is no longer debatable as we view the prior holdings of this court.

Spector Motor Service, Inc. v. O'Connor, 340 U. S. 602, struck down a state tax imposed upon the franchise of a foreign corporation for the privilege of doing business within the State of Connecticut when the business consisted solely of interstate commerce.

A review of the privilege tax assessed by respondent over and above the statutory minimum provided by the statute and based solely upon petitioner's interstate commerce (it engaged in no local or intrastate commerce within the State of Michigan), speaks for itself in its arbitrary and unreasonable result for it bears no relationship whatever to petitioner's activity within the state.

1952	$3,691.19	1956	$6,333.47
1953	4,360.03	1957	6,960.87
1954	4,947.78	1958	7,611.56
		1959	8,025.30

Strict compliance with Sec. 5c and without reference to Sec. 5e results in an allocation of in excess of 49% of petitioner's tonnage and therefore in excess of 49% of its paid-up capital and surplus to Michigan when in fact no intrastate business was performed in Michigan. The result of the formula used by respondent in computing petitioner's tax is to deprive petitioner of due process of law, for, as computed, the franchise tax is not related in any degree to petitioner's taxable activities in Michigan, for there were none.

The effect of including in excess of 49% of petitioner's interstate tonnages in the formula is to enhance the tax and to inflate the amount of capital and surplus attributable to Michigan. If there was some relationship between the 49% of petitioner's interstate business and its privilege of doing business in Michigan, there might be some reason for the present assessment. It is abundantly clear, however that no such relationship exists. Respondent would treat a portion of petitioner's interstate business as intrastate business conducted in Michigan. The facts and law preclude such an interpretation.

The formula as applied by respondent is not a formula "reasonably apportioning business done within this state." In the formula and ultimately in the tax, respondent has included tonnages which the state has no right to tax and which are in no way related to intrastate commerce. The inclusion, therefore, of tonnages which are without question interstate in nature clearly renders the formula as applied here, arbitrary, unreasonable and in violation of the Commerce Clause as a *direct* tax on interstate commerce.

It is evident from the reasoning propounded by respondent, that were the decision of the court below to be per-

mitted to stand, a dangerous and totally inequitable precedent would be set. The present posture of the litigation calls upon petitioner to pay an additional $25,930.90 in franchise taxes which have been imposed upon a foreign corporation engaged solely and exclusively in interstate commerce. Were this holding to be sustained, every state could impose a like tax on a corporation whose vessels call at the port of a given state. This burden upon interstate commerce is exactly the situation our forefathers sought to prevent in framing the Federal Constitution and the Commerce Clause contained therein.

The Supreme Court of the United States in *Cheney Brothers Co.* v. *Mass.*, 246 U. S. 147, long ago established the principle that:

> "A corporation engaged in 'wholly interstate commerce' within a state was immune from a franchise fee or excise tax for the privilege of doing local business."

This was re-affirmed in *Alpha Portland Cement Co.* v. *Mass.*, 268 U. S. 203.

> "An excise of franchise tax is ipso facto a tax for the right of doing business in the state. Where the business which the corporation does in the state is wholly interstate, the corporation is exercising a privilege which cannot be conferred on or withheld by the state, but to which the corporation is entitled by the Constitution of the United States."

In *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555, a franchise tax on wholly interstate commerce was unconstitutional.

In practical effect Act No. 85 PA 1921, as amended, amounts to an imposition of a tax upon the privilege of loading and unloading cargoes in interstate commerce. This is particularly so in the case of petitioner whose entire business was interstate commerce.

It is true enough that when a corporation is engaged in intrastate commerce within a state, the fact that it is also engaged in interstate commerce will not exempt it from paying a franchise tax for the privilege of conducting its intrastate business. There are two important limitations on this principle: First, the fact that taxpayer engaged in interstate commerce must *not* be used to increase the tax exacted from it for the privilege of transacting intrastate commerce; and second, acts and transactions which are *essential* and *integral* parts of the interstate process cannot be considered at all. There are many authorities, but we will recite only a few. The principle is stated thus in *East Ohio Gas Company v. Tax Commission of Ohio*, 283 U. S. 465, at page 470:

> "* * * It is elementary that a state can neither lay a tax on the act of engaging in interstate commerce nor on gross receipts therefrom. * * *
>
> "And, while a state may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction *in order to be valid must be imposed solely on account of the intrastate business without enhancement because of the interstate business done and it must appear that one engaged exclusively in interstate business would not be subject to the imposition and that the taxpayer could discontinue the intrastate business without also withdrawing from the interstate business.*" (Emphasis ours)

In *Railway Express Agency v. Virginia*, 347 U. S. 359 the Express Agency did no intrastate business at all; it simply received packages for interstate shipment. The State of Virginia levied an annual license tax of the gross receipts of this business, which it called a property tax. In holding the tax unconstitutional, the Court said at page 368:

> "It is enough to say that we recently have ruled that local incidents, such as gathering up or putting down interstate commodities as an integral part of their interstate movement are not adequate grounds for a state license, privilege or occupation tax."

As early as the case of *State Freight Tax*, 15 Wall. (U. S.) 232, it became clear that the commerce clause prohibits a state from selecting certain local aspects of interstate and foreign commerce as incidents for the imposition of a fee or tax. The Supreme Court has never deviated from this position. *Nippert* v. *Richmond*, 327 U. S. 416.

The loading and unloading of cargo is as much a part of interstate and foreign commerce as is the transportation of such cargo. *Puget Sound Stevedoring Company* v. *State Tax Commission*, 302 U. S. 90, 92, recognizes this for it was there said at page 92:

> "Transportation of a cargo by water is impossible or futile unless the thing to be transported is put aboard a ship and taken off at destination."

It is plain that the loading and unloading of cargoes carried in interstate and foreign commerce are part of that commerce and, therefore, cannot be made the subject of a privilege fee. *Joseph* v. *Carter & Weekes Stevedoring Company*, 330 U. S. 422.

In *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, a Pennsylvania tax, assessed on the capital stock of a New Jersey corporation which operated a ferry between New Jersey and Pennsylvania, was held invalid. The state argued that the corporation was doing business in Pennsylvania in that it landed and received passengers and freight at a leased dock in Pennsylvania. To this the Court answered, page 203:

> "As to the first reason thus expressed, it may be answered that the business of landing and receiving,

passengers and freight at the wharf in Philadelphia is a necessary incident to, indeed is a part of, their transportation across the Delaware River from New Jersey. Without it that transportation would be impossible. Transportation implies the taking up of persons or property at some point and putting them down at another. A tax, therefore, upon such receiving and landing of passengers and freight is a tax upon their transportation; that is, upon the commerce between the two states involved in such transportation."

The fact that the corporation could not lease its wharf in Philadelphia except by the implied consent of the Legislature of the Commonwealth, was held by the court to be of no significance for:

> "... if by reason of landing or receiving passengers and freight at wharves, or other places in a state, they can be taxed by the state on their capital stock on the ground that they are thereby doing business within her limits, the taxes which may be imposed may embarrass, impede and even destroy such commerce with the citizens of the state." (Page 205)

Although the Puget Sound case involved a tax on gross receipts and Act No. 85 of PA 1921 involves a privilege fee computed on the basis of tonnages loaded and unloaded, the distinction is one without difference, for both tax the privilege of carrying on interstate commerce.

Recently the Supreme Court of Appeals of West Virginia had before it issues very similar to those which this Court is now asked to decide. *American Barge Line Company v. Koontz*, 68 S. E. (2d) 50. West Virginia sought to impose a privilege tax upon the transportation of freight by water, based upon the proportion of gross income and determined by ton miles of freight carried within the state. The Court held that the state could levy a tax on the inter-

state freights (from port to port within West Virginia) but that the freight earned in interstate commerce, whether passing through West Virginia or whether beginning or ending here, could not lawfully be subjected to taxation by West Virginia. The court said on page 63:

> "There is certainly no taxable incident in connection with through traffic of the plaintiff's occurring within the State of West Virginia which would afford a basis for the tax. And the only incidents occurring in the State of West Virginia connected with one point interstate traffic is delivery of shipments so classified to their destination, or the acceptance and embarkation of shipments at points in this state destined to points in other states. Those incidents are not sufficient to support the tax."

Under the Constitution of the United States, the power to regulate interstate and foreign commerce belongs solely to congress. Any exaction in any form made on interstate or foreign commerce is a burden on that commerce almost as to a regulation thereof. *Lehigh v. Port of Mobile*, 127 U. S. 624, 635. The exaction may be invalid because it takes the form of a direct burden, *Spector Motor Service, Inc. v. McLaughlin*, 323 U. S. 101; *Ozark Pipe Line Corp. v. Monier*, 266 U. S. 555; *Eureka v. Heard*, 329 U. S. 249; but whether or not the burden is direct, it will be struck down if it substantially or unreasonably burdens or obstructs the free flow of commerce. *Michigan-Wisconsin Pipe Line Co. v. Calvert*, supra; *Puget Sound Stevedoring Co. v. State Tax Commission*, supra; *Joseph v. Carter & Weekes Stevedoring Co.*, supra.

Petitioner here has been assessed according to the number of cars loaded or unloaded in Michigan irrespective of the fact it engaged in no intrastate commerce. As such, it constitutes a *direct* tax on the interstate commerce engaged

in by petitioner and thus clearly constitutes an unlawful burden on interstate commerce.

Cooney v. Mountain States Telephone & Telegraph Co., 294 U. S. 384 (55 S. Ct. 477, 79 L. Ed. 934) still recites the law concerning the right of a state to impose an excise or franchise fee on a corporation engaged wholly in interstate commerce for the privilege of doing local business. This Court stated (pp. 392-393):

> "There is no question that the State may require payment of an occupation tax from one engaged in both intrastate and interstate commerce. *But a State cannot tax interstate commerce; it cannot lay a tax upon the business which constitute such commerce or the privilege of engaging in it.* And the fact that a portion of a business is intrastate and therefore taxable does not justify a tax either upon the interstate business or upon the whole business without discrimination. * * * Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; *that one engaged exclusively in interstate commerce would not be subject to the tax*; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business. (Emphasis ours)

In *East Ohio Gas Co. v. Tax Commission of Ohio*, 283 U. S. 465 (51 S. Ct. 499, 75 L. Ed. 1171), this Court left no doubt that a state cannot increase its tax on interstate commerce by any device calling for the inclusion of ton miles of interstate freight and, further, that transactions which are an essential and integral part of interstate commerce cannot be considered, saying at p. 470:

> "It is elementary that a State can neither lay a tax on the act of engaging in interstate commerce

> nor on gross receipts therefrom * * *. And, while a State may require payment of an occupation tax by one engaged in both intrastate and interstate commerce, the exaction in order to be valid must be imposed solely on account of the intrastate business without enhancement because of the interstate business done, and it must appear that one engaged exclusively in interstate business would not be subject to the imposition and that the taxpayer could discontinue the intrastate business without withdrawing from the interstate business."

The rule governing the case now under consideration was clearly stated in *Commissioner of Corporation & Tax'n.* v. *Ford Motor Co.*, 308 Mass. 558, 33 NE(2) 318.

> "A state is without power to tax a foreign corporation for the privilege of engaging in interstate commerce, or to exact an excise from a foreign corporation that conducts only an interstate business within the state."

3. The Hartland & Panhandle decisions of the highest court of the State of Michigan appeared at the time of their pronouncement to settle the question of how the privilege tax, over and above the minimum statutory amount, should be calculated for foreign corporations qualified to do business in Michigan and engaged in interstate and intrastate commerce. This was particularly true when this court denied certiorari in the Panhandle case, 340 Mich. 60, certiorari denied 352 U. S. 890. There likewise appeared to be little doubt as to how the tax would be calculated when a foreign corporation qualified to do business in Michigan, engaged solely in interstate commerce. The result of the decision of the court below in the instant case, however, has caused greater confusion and uncertainty than ever before by its obvious contradictory holding to its own prior

decisions in Gartland and Panhandle not to mention the pronouncements of this court on the subject.

Petitioner stresses that a review of the decision of the court below is vital to the encouragement of those carriers by water engaged in either interstate and intrastate commerce or both, to eliminate the inequities prominent in the decision of the court below and to clarify the constitutional principles involved. This court is respectfully urged to issue its writ of certiorari in order that the decision of the Michigan Supreme Court be reviewed and, that the questions presented be set at rest.

VII.

CONCLUSION

Therefore, petitioner respectfully requests that a writ of certiorari issue to the Supreme Court of Michigan.

January 7, 1964

Respectfully submitted,

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Wisconsin & Michigan Steamship Company

John A. Mundell, Jr.
Of Counsel

APPENDIX A

OPINION OF THE COURT BELOW

STATE OF MICHIGAN
SUPREME COURT

WISCONSIN & MICHIGAN STEAMSHIP COMPANY,

Petitioner-Appellant,

v.

CORPORATION AND SECURITIES COMMISSION,

Respondent-Appellee.

BEFORE THE ENTIRE BENCH, except Smith, J.

SOURIS, J. (for affirmance)

Appellant steamship company is a Wisconsin corporation carrying passengers, automobiles and other freight across Lake Michigan between the ports of Milwaukee, Wisconsin and Muskegon, Michigan. In 1941, *upon its own application*, it was admitted to do intrastate business within Michigan. From 1952 through 1959, it filed the annual reports required by law to be filed with the corporation and securities commission by every domestic and foreign profit corporation granted the privilege of doing such business within this State. Section 4 of PA 1921, No. 85, as amended (CLS 1956, § 450.304) (Stat Ann 1958 Cum Supp § 21.205) The appeal from the corporation tax appeal board concerns the amount due the State during those years (except 1955) as appellant's annual franchise fee payable at the time of filing its annual reports.

Appellant does not claim that the State seeks to impose

a tax upon it, a foreign corporation, for the privilege of conducting its interstate business in Michigan. Nor does the State claim in this case that it could do so lawfully. Instead, appellant *voluntarily* applied for admission to do business locally within this State and was granted that privilege. While appellant concedes the State may charge it the statutory minimum fee of $10 annually for the local privilege granted notwithstanding its professed failure to date to exercise the granted privilege, it denies the State's right to charge it a privilege fee based upon any formula which takes into account any of the appellant's interstate business. Appellant and the State spend considerable effort in arguing whether appellant's activities in Michigan constitute exercise of its local privilege. Were this a case in which the State sought to compel appellant to qualify for admission and to pay a privilege fee therefor on the ground that its activities in Michigan constituted local business, we would be required to resolve the parties' argument. However, this is not such a case. Appellant does not deny that it is liable for some fee for its voluntarily acquired privilege, whether exercised or not. The only question is its amount and the answer to that question *does not* depend upon whether or to what extent appellant engages in what may be called purely local business.

Michigan's annual franchise fees are imposed alike upon domestic corporations and foreign corporations admitted to do business within the State. Corporations, both domestic and foreign, not maintaining a regular place of business outside this State, other than a statutory office, paid, during the period here in controversy, an annual privilege fee of 4 mills upon each dollar of their entire paid-up capital and surplus.[1] Except for certain classes of carriers, of which

[1] CLS 1956, § 450.305 (Stat Ann 1961 Cum Supp § 21.203).

appellant is one, other corporations are required to pay annual franchise fees measured by that proportion of their paid up capital and surplus attributable to Michigan in accordance with an apportionment formula known as the Massachusetts formula.[2] The annual franchise fees of motor carriers of property and all carriers by water, such as appellant, whether domestic corporations or foreign corporations admitted to do business in Michigan, are measured by the apportionment formula set forth in the margin.[3] This formula provides for the allocation of a portion of the carrier's paid-up capital and surplus to Michigan, and thereby subject to Michigan's 4 mill franchise fee rate, in proportion to the ratio which the carrier's total tonnages of revenue passengers[4] and cargo received or discharged within Michigan bears to its total tonnages received and discharged everywhere.

It is appellant's claim that inasmuch as it engaged solely in interstate commerce in Michigan, the annual franchise fee claimed from it by the State, determined in accordance with the statutory formula which takes into account appellant's interstate tonnages, constituted a direct

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[2] *Ibid.* The statutory provision is reproduced and described by Mr. Justice Talbot Smith in *Cleveland-Cliffs Iron Co.* v. *Corporation & Securities Commission*, 351 Mich. 652, 672-674.

[3] "(1) In the case of motor carriers of property, and carriers by water, the annual franchise fee shall be measured by that portion of the corporation's paid-up capital and surplus as the sum of the tonnage of revenue passengers and revenue cargo first received or finally discharged by the carrier within this state is to the total of such tonnage so received and so discharged by such carrier within and without this state." ***" C.L.S. 1956, § 450.305c (Stat. Ann. 1961 Cum. Supp. § 21.203(3)).

[4] Although the attorney general tells us in his brief that the statutory reference to "tonnage of revenue passengers" has been construed to refer "to the number of passengers, rather than to their gross weight", we note from the appellant's annual reports filed as exhibits that weight was in fact used, a hypothetical average of 150 pounds per passenger. The matter is not important to the issue presented by this appeal.

burden by the State on interstate commerce in contravention of the commerce clause of the Federal Constitution, Art. I, § 8. Relying upon *Gartland Steamship Company* v. *Corporation & Securities Commission*, 339 Mich. 661, and *Panhandle Eastern Pipe Line Company* v. *Corporation & Securities Commission*, 346 Mich. 50, appellant argues that none of its interstate passenger and cargo tonnages should have been considered in computing the apportionment factor to be applied to its paid-up capital and surplus for determining what portion thereof was subject to the 4 mill franchise fee rate. Since appellant's entire business in Michigan, according to its view, was in interstate commerce, it contends that none of its tonnage properly could be taken into account and that the apportionment factor under such circumstances should have been zero. That result, of course, would have relieved appellant of all liability under the statutory formula (although appellant concedes liability for the annual $10 minimum fee required by CLS 1956, § 450.304 [Stat. Ann. 1959 Cum. Supp. § 21.205]).[1] In support of its contention that inclusion of its interstate tonnage in application of the statutory apportionment formula results in a direct burden by the State upon interstate commerce forbidden by the commerce clause, appellant cites *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602 (71 S. Ct. 508, 95 L. ed. 573); *Conner* v. *Mountain States Telephone & Telegraph Co.*, 284 U. S. 384 (55 S. Ct. 477, 79 L. ed. 934); and *Ozark Pipe Line Corporation* v. *Monier*, 266 U. S. 555 (45 S. Ct. 184, 69 L. ed. 439), among many others.

Michigan's corporate franchise fee is not an *ad valorem* tax on property, nor is it an income tax, a gross receipts tax

[1] Implicit in appellant's concession of liability for the annual $10 minimum franchise fee is its recognition that the State properly may charge some fee at least when the franchise granted was voluntarily sought, whether or not it was actually exercised.

nor a sales tax. Keeping in mind what Michigan's franchise fee is not, it may be conceded that the State may not otherwise impose a charge upon appellant for the privilege of doing an interstate business in Michigan. For this proposition of law Spector, Cooney and Ozark, *supra*, relied upon by appellant, are only a few of the authorities that may be cited. See *Duluth, South Shore & Atlantic Railroad Co.* v. *Corporation & Securities Commission*, 353 Mich. 636, at p. 655 (appeal dismissed and certiorari denied, 359 U. S. 310 [79 S. Ct. 876, 3 L. ed. 2d 831]). But these authorities are inapposite to determination of the validity of the privilege fee sought to be charged to this appellant.

As we have noted before, it is a fee imposed by the State, upon domestic as well as foreign corporations, for the *privilege* of exercising corporate franchises *within* this State *Union Steam Pump Sales Co.* v. *Secretary of State*, 216 Mich. 261; *In re Detroit International Bridge Co.* v. *Corporation Tax Appeal Board of Michigan*, 287 U. S. 295 (53 S. Ct. 137, 77 L. ed. 314); *Cleveland Cliffs Iron Co.* v. *Corporation & Securities Commission*, 351 Mich. 652, and Duluth, *supra*. The fee charged is for the privilege granted, as the legislature itself has stated, "irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period." C. L. S. 1956, § 450.304 (Stat. Ann. 1950 Cum. Supp. § 21.205). *See Holland Hitch Company* v. *State of Michigan*, 318 Mich. 474, 479.

It is not the privilege to do interstate business in Michigan for which appellant applied to the State and for the grant of which the State seeks to charge it an annual fee. Its right to engage in such interstate business in Michigan is not subject to the State's grant or denial. Appellant sought, and was granted, the privilege to do *intrastate*

business in Michigan.* Whether or not appellant actually exercised its corporate franchises in Michigan in the conduct of intrastate business, it was granted the privilege to do so, upon its own application, and, so, must pay. As Mr. Justice Edwards pointed out in *Duluth*, 353 Mich. 636, at p. 657, the United States Supreme Court has frequently upheld such state privilege or franchise fees levied upon the right to do intrastate business as not offensive to the commerce clause. *St. Louis-San Francisco R. Co. v. Middlekamp*, 256 U. S. 226 (41 S. Ct. 489, 65 L. ed. 905); *Hump*

*In view of appellant's contention that its business is "100% interstate", one wonders why appellant voluntarily applied, in 1941, for the privilege of doing intrastate business in Michigan and then, assertedly, never exercised the privilege granted. An examination of Wisconsin law suggests a possible reason for the seemingly inconsistent course followed by appellant. 1939 Wis. Stat. § 71.02 (3) (d) provided that "Persons engaged in business within and without the state shall be taxed only on such income as is derived from business transacted and property located within the state." (This provision is the same today; see Wis. Stat. Ann § 71.07 (2) (c).) In *Trane Co. v. Tax Commission* (1940), 235 Wis. 516, the Wisconsin Supreme Court held that the entire income of a Wisconsin manufacturing corporation was derived from business transacted and property located within the state, and so subject to Wisconsin's income tax notwithstanding that nearly one third of the corporation's net income accrued from sales originated by sales representatives located outside of the state. For a discussion of other Wisconsin cases construing the statutory language in such a manner as to subject all of a corporation's income to the Wisconsin income tax, even though the corporation engaged in activities in other states, see *Department of Taxation v. Blatz Brewing Co.* (1961), 12 Wis. 2d 615. Although most of those cases involved manufacturing corporations, still the judicial attitude exhibited in those cases may have induced appellant to try to acquire all possible indicia of engaging in business outside of Wisconsin in order to qualify for the apportionment benefits of Wisconsin's income tax law. One means by which it could do this was to obtain the privilege of doing intrastate business in Michigan. As the Wisconsin court pointed out in *Blatz*, *supra*, "Although 'engaged in business' means something less than the standard which requires a license to do business in a state, still not every 'activity' out of the state constitutes engaging in business there within the meaning of sec. 71.07 (2) . . . ." Thus, appellant could argue that its qualification to do business in Michigan was evidence of its having met, and, indeed having exceeded, the standard required to be "engaged in business" in another state.

Hairpin Manufacturing Co. v. *Emmerson*, 258 U. S. 290 (42 S. Ct. 305, 66 L. ed. 622); *International Shoe Co.* v. *Shartel*, 279 U. S. 429 (49 S. Ct. 380; 73 L. ed. 781); *Ford Motor Co.* v. *Beauchamp*, 308 U. S. 331 (60 S. Ct. 273, 84 L. ed. 304); *International Harvester Co.* v. *Evatt*, 329 U. S. 416 (67 S. Ct. 444, 91 L. ed. 390); *Interstate Oil Pipe Line Co.* v. *Stone*, 337 U. S. 662 (69 S. Ct. 1264; 93 L. ed. 1613). The only meritorious issue before us is whether Michigan may determine the amount of such privilege fee by reference to appellant's total business transacted in Michigan which, for our purposes we may assume, as appellant claims, was solely interstate in character, or whether it may be charged a franchise fee in excess of the $10 minimum fee provided by the statute only when it actually conducts intrastate business in Michigan and then by reference only to such intrastate business.

The *Gartland* case, 339 Mich. 661, seemingly supports appellant's contention that interstate business must be excluded from consideration in determining the apportionment formula used in computing the franchise fee. *Parkanelli*, 344 Mich. 50, likewise seemingly supports appellant's contention. In the *Dalati* case, 353 Mich. 636, however, this Court severely limited the opinions in Gartland and Parkanelli and, realistically considered, overruled their holdings to the extent that they could be construed to mean what appellant claims for them here. Our majority in Duluth expressly held Gartland and Parkanelli notwith-

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"Both *Gartland* and *Parkanelli* opinions, however, relied upon *Conney* v. *Minnesota Stock T. & T. Co.*, 291 US 384 (54 S Ct. 477, 79 L ed 934), for constitutional authority. Both failed to distinguish between the direct taxation of *interstate* commerce (which *Conney* ruled out) and the employment of an interstate-commerce factor in the formula for determining the amount of paid-up capital and surplus to be allocated to Michigan in computing the fee to be assessed for doing intrastate business in Michigan." 353 Mich. 636, at p. 665.

standing, "that there is no constitutional barrier to the use of an interstate commerce factor in the allocation formula for determining the portion of paid up capital and surplus allocable to Michigan for computation of a franchise tax for the right to carry on intrastate business in Michigan where, as here, there is no showing that such formula reaches an unreasonable or discriminatory result." 353 Mich. 636, at p. 665.

The United States Supreme Court expressed the principle affirmatively in *Spector Motor Service, Inc.* v. *O'Connor*, 340 U. S. 602, at pp. 609, 610, as it relates to a taxpayer engaged in both intrastate and interstate commerce:

> "[A] state may tax the privilege of carrying on intrastate business and, within reasonable limits, may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate."

In *Cleveland-Cliffs Iron Company* v. *Corporation & Securities Commission*, 353 Mich. 652, the taxpayer challenged not the apportionment formula utilized in determining what portion of its paid-up capital and surplus was allocable to Michigan for annual franchise fee purposes but, rather, the inclusion in its capital account of stock investments claimed to be separable from its Michigan operations. Invoking the provisions of C.L.S. 1956, [illegible] (Stat. Ann. 1961 Cum. Supp. 21.209[5]),[2] Cleveland-Cliffs sought to exclude such investments from the paid-up capital and surplus *base* to which the apportionment factor is applied. The Court's majority carefully established the nature of the privilege fee involved saying [illegible] "AND are a tax on the privilege of carrying on intrastate business

[2] Appellant here, unlike Cleveland-Cliffs, did not seek adjustment of its franchise fee liability by claiming immunity accorded by administrative action authorized by this statutory provision.

"It is thus completely pointless for plaintiff to argue that when it came into this State it 'did not apply for admission to the State of Michigan with respect to holding investments in steel stocks.' Nor did it specifically, with respect to its iron ore holdings in Minnesota, or to its office furniture in Cleveland. Here we are not taxing these things. We are taxing the value of the exercise of a privilege in this State and we ascertain that value through the application of property, payroll, and sales factors to the fair average stock value or the paid up capital and surplus."

The proofs disclosed that Cleveland-Cliffs' business activities in Michigan, apparently including intrastate as well as interstate activities, were extensive and constituted a substantial part of its total business. Unlike the case at bar, the Court there was dealing with a taxpayer concededly actually exercising the granted privilege. As we have noted above, however, the franchise fees payable in this State whether or not the privilege is exercised. And whether or not the privilege is exercised does not under our statute make any difference in the basis for determination of the amount of the annual fee payable, either by a domestic or a foreign corporation nor, as we have previously said in *Dalpati*, 353 Mich. 638, at p. 665, is there any reason constitutionally to bar use of interstate commerce factors in making such determination.

Whether or not the privilege granted a taxpayer to do an intrastate business is exercised has nothing whatever to do with the right of a state, unhampered by the commerce clause, to charge for such privilege a fee based upon a reasonably allocated portion of the taxpayer's capital and surplus. What Michigan says to the taxpayer, in effect, is this: "Separate and apart from your unquestioned right to exercise your corporate franchises in interstate com-

merce within this State, without imposition by this State of a fee for the exercise of that right, you may also pursue your business within this State in matters not involving interstate commerce, but only upon payment of a fee for that privilege. That fee will be measured by determination of that portion of your total paid-up capital and surplus available for such intrastate business, whether or not the privilege actually is exercised by you." In *Ford Motor Company v. Beauchamp*, 308 U. S. 331 (60 S. Ct. 273, 84 L. ed. 304), relied upon and quoted by our majority in *Cleveland Cliffs*, 251 Mich. 452, at pp. 625, 626, the United States Supreme Court, at p. 336, recognized the constitutional propriety of measuring the fee for the privilege, the worth of such local privilege by the "financial power" or capital potency available for use within the taxing state upon exercise of the privilege granted:

> "In a unitary enterprise, property outside the state, when correlated in use with property within the state, necessarily affects the worth of the privilege within the state. Financial power inherent in the possession of assets may be applied, with flexibility, at whatever point within or without the state the managers of the business may determine. For this reason it is held that an entrance fee may be properly measured by capital wherever located, the weight, in determining the value of the intrastate privilege, given the property beyond the state boundaries is but a recognition of the very real effect its existence has upon the value of the privilege granted within the taxing state."

It is not now open to dispute that when such intrastate privilege is exercised by a taxpayer the fee charged for such privilege may be based upon a portion of the tax-

payer's capital and surplus, wherever located, allocated in the manner provided by Michigan's statute. *Ford Motor Company* v. *Beauchamp, Duluth, and Cleveland-Cliffs, supra*, and cases cited and discussed in Duluth, at pp. 660-663 and in Cleveland-Cliffs, at pp. 690-698. Even in such cases in which the local privilege actually has been exercised, the privilege fee is determinable not by allocation to the taxing state of that portion of the corporate taxpayer's capital and surplus actually utilized therein but, rather, by allocation of that portion of its capital and surplus reasonably available for such use. There is no constitutional reason, absent discrimination between domestic and foreign corporations, why a state may not determine corporate franchise fees on the basis of the potential capital,—the financial power of capital potency,—reasonably available to a corporation for use within the taxing jurisdiction, whether or not actually so used.

The statutory scheme of taxation discloses that the incidence of Michigan's corporate franchise tax is that portion of the taxpayer's paid-up capital and surplus actually utilized in Michigan for any purpose,—therefore available for use here in exercise of its local privilege,—and, thus, theoretically at least, not available for use elsewhere nor subject to a similar tax in other states. Apportionment of a multi-state corporation's capital and surplus is accomplished in Michigan in several days depending upon the nature of the taxpayer's business. For most taxpayers, this apportionment is determined by formula taking into account the taxpayer's property, payroll and sales in Michigan and everywhere. For carriers by aircraft, the apportionment is determined by formula taking into account both revenue tons handled and originating revenues in Michigan and everywhere. Railroads' franchise fees are deter-

mined by use of another formula, as are the fees of certain financial institutions and the fees of motor carriers of passengers. Finally, the franchise fees of motor carriers of property and carriers of passengers or cargo by water, with which we are here concerned, are determined by formula taking into account tonnage of revenue passengers and revenue cargoes received and discharged in Michigan and everywhere.

Contrary to appellant's assertions, the various formulae involved in the apportionment process do not result in the imposition of the franchise fee upon the taxpayer's property, payroll, sales or upon any other factor referred to in those formulae. See Cleveland-Cliffs, 351 Mich. 652, at p. 682. The references to property, payroll, sales, revenue tons, originating revenues and passenger and cargo tonnages have as their sole objective establishment of a realistic standard for allocating a reasonable portion of the taxpayer's capital and surplus to the taxing state as a base for imposition of its franchise fee rate.

Having concluded that a state may charge its corporate franchise fee to a foreign corporation granted local privileges, whether or not actually exercised, and since the amount of the fee charged by Michigan is not dependent upon whether, and to what extent, intrastate business is actually conducted in Michigan, it is not necessary to review the corporation tax appeal board's finding that appellant was engaged in such intrastate business during the periods involved in this appeal.

Affirmed. No costs, there being involved statutory and constitutional provisions affecting the State's revenues.

APPENDIX B

ORDER DENYING APPLICATION FOR REHEARING

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the 9th day of October in the year of our Lord one thousand nine hundred and sixty-three.

Present the Honorable LELAND W. CARR, Chief Justice, JOHN R. DETHMERS, HARRY F. KELLY, EUGENE E. BLACK, THOMAS M. KAVANAGH, THEODORE SOURIS, OTIS M. SMITH, MICHAEL D. O'HARA, Associate Justices.

Wisconsin & Michigan Steamship Co.,

vs. 49718

Corporation and Securities Commission.

A motion for rehearing having been heretofore submitted herein, it is hereby DENIED.

STATE OF MICHIGAN—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 11th day of October in the year of our Lord one thousand nine hundred and sixty-three.

DONALD F. WINTERS
Clerk

APPENDIX C

Statute and Constitutional Provisions

Act No. 85 of PA 1921, §§ 4 and 5 (e), as amended CLS § 450.304 and 450.305 (e); MSA, 1963 Cum. Supp. § 21.205 and 21.208(3) and (5), Secs. 4, 5e and 5f.

"Sec. 4. Every cooperative association and every profit corporation organized or doing business under the laws of this state, or having the privilege to do business, employing capital or persons, owning or managing property or maintaining an office, or engaging in any transaction, in this state excepting domestic and foreign insurance companies, domestic and foreign building and loan and savings and loan associations, medical care corporations, hospital service corporations, state and national banking corporations, trust companies, and such corporations now in existence or hereinafter incorporated formed with the consent of the banking commissioner for the state of Michigan for the purpose of taking over all or part of the assets of closed banks or trust companies with the intent and purpose of liquidating such assets when and as conditions warrant such action by said corporations, shall pay, at the time of filing the annual report with the Michigan Corporation and Securities Commission, as required by sections 81 and 82 of Act No. 327 of the Public Acts of 1931, being sections 450.81 and 450.82 of the Compiled Laws of 1948, an annual fee of (4) mills upon each dollar of its paid up capital and surplus; but such franchise fee shall in no case be less than $10.00. Operating railroad, interurban railroad, telephone, telegraph and express companies heretofore exempt from this franchise tax shall be exempt as to the franchise tax payable in 1953 and thereafter unless the state board of assessors has certified prior thereto to the Michigan Corporation and Securities Commission,

that the specific tax rate under Act No. 282 of the Public Acts of 1965, as amended, being sections 207.1 to 207.21 of the Compiled Laws of 1948, has been based upon state equalized valuation. It is the intent of this section to impose the tax herein provided for upon every corporation, foreign or domestic, having the privilege of exercising corporate franchises within the state, irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period. The Michigan Corporation and Securities Commission shall in all such cases be authorized to require the corporation to furnish detailed and exact information touching such several matters before making a final determination of the privilege fee to be paid by such corporation. For the purpose of this act only, each share of no par value shall be deemed to have the value of at least $1.00, or such value as shall have been fixed by the corporation for the sale of such stock, or the book value as determined by the Michigan Corporation and Securities Commission, whichever may be the higher. In any case where the capital of a corporation is not divided into shares, the whole property thereof shall be deemed to be the authorized capital stock for the purposes of this act.

"The term 'surplus', as used in this act, shall be taken and deemed to mean the net value of the corporation's property, less its outstanding indebtedness and paid up capital; but in no case, either as to domestic or as to foreign corporations, shall any deduction be made from the item of paid up capital, in computing the franchise fee thereon, by reason of any impairment of the same.

"Sec. 5c (1). In the case of motor carriers of property and carriers by water, the annual franchise fee shall be measured by that portion of the corporation's paid up

capital and surplus as the sum of the tonnage of revenue passengers and revenue cargo first received or finally discharged by the carrier within this state is to the total of such tonnage so received and so discharged by such carrier within and without this state."

"Sec. 36. If it shall appear on the application of the taxpayer or otherwise that an allocation factor determined pursuant to this act does not properly reflect the activity, business, receipts and capital of a taxpayer reasonably attributable to the state, the commission shall adjust it by:

(1) Excluding 1 or more of the factors or any component thereof;

(2) Including 1 or more other factors, such as expenses, purchases, contract values (using subcontract values);

(3) Excluding proportionately 1 or more assets from the computation of entire paid-up capital and surplus; or

(4) Apply any other similar method calculated to effect a fair and proper allocation according to the receipts, activity, business and capital reasonably attributable to this state.

"The commission shall promptly publish its rulings with respect to any application of the provisions of this section. Such rulings shall be promulgated in accordance with the administrative procedure act."

APPENDIX D

(Exhibit 5)

FOSTER & MEADOWS
Penobscot Building
Detroit 26
October 3, 1955

Honorable James C. Allen, Commissioner
Michigan Corporation and Securities Commission
Bank of Lansing Building
Lansing, Michigan

Dear Mr. Commissioner:

Wisconsin & Michigan Steamship Company
Annual Franchise Fee

This letter is written in furtherance of telephone conversation between you and the writer last Friday in connection with the above.

This matter came to our attention some weeks ago, at which time the writer telephoned Miss Ann Sawasky and discussed the matter with her on the phone. At that time she requested the same data with respect to revenue passengers and revenue freight as was given in the 1954 Annual Report. We advised at that time that the company transported no property between points in the State of Michigan or intra-state commerce. We nevertheless suggested that Mr. F. J. Knoblauch furnish the information requested, and he did this in his letter of September 6, 1955, pointing out that all traffic handled was in interstate commerce and there was no traffic in intra-state commerce.

Miss Sawasky advised the company under date of September 14 that the privilege fee was figured on the paid in capital of $222,000 and surplus of $2,610,741 at the rate of 4 mills on the dollar, which results in $5,470.52 plus a

filing fee of $2 for a total of $5,472.52. The company had previously submitted $12, of which $2 was the filing fee and $10 was the privilege fee.

Wisconsin & Michigan Steamship Company is a Wisconsin corporation with its principal office for the transaction of business at 358 N. Plankinton Avenue, Milwaukee 3, Wisconsin. The company holds a certificate from the Interstate Commerce Commission given under Part III of the Interstate Commerce Act in Docket No. W-294 authorizing the company among other things, to transport passengers and commodities generally between the ports of Milwaukee, Wisconsin, and Muskegon, Michigan.

In all of the traffic involved during the period in question, the company moved no traffic whatever from one point in Michigan to another point in Michigan. The Michigan statute under which the company pays its privilege fee was involved in the case of *Cartland Steamship Company v. Michigan Corporation & Securities Commission* and is reported at Volume 339 Michigan Reports, page 661. From a reading of that case it would appear plain that Wisconsin & Michigan Steamship Company, being a foreign corporation licensed in this State, should not be taxed in connection with cargoes transported in interstate and foreign commerce.

We have also again re-examined the case of *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602, 71 S. Ct. Rep. 508, which would appear to be controlling in the situation we have here. It is the position of Wisconsin & Michigan Steamship Company that the payment of the $10 fee plus the $2 filing fee is all of the privilege fee which they are required to pay under the Michigan statutes.

Some confusion may have arisen because of the manner in which paragraph 2 of the 1955 report is filled in. Under

the heading, "The act under which incorporated or reincorporated," there was filled in, "Act 327 Public Acts of 1931." This is obviously in error, as the company was organized under the general corporation laws for the State of Wisconsin, and what was intended by the company was that the company was admitted to do business in Michigan under the appropriate provisions of Act 327, Public Acts of 1931.

If the letter of Miss Ann Sawasky under date of September 14, 1955, is a tentative determination of the company's tax, would appreciate a final determination being made so that if the same is adverse the matter may be taken to the Appeal Board under the appropriate provisions of the act. We would call your attention to the attachment to the Michigan Annual Report as filed, wherein it is pointed out there was no intra-state commerce involved and that 100% of the transportation service performed by the company was in interstate commerce.

We shall await your further advices in the matter.

Very truly yours,
FOSTER & MEADOWS
By: Sparkman D. Foster

SDF:lc
cc: F.J. Knoblauch, Vice President
Wisconsin & Michigan Steamship Company
350 N. Plankinton Avenue
Milwaukee 3, Wisconsin

APPENDIX E

(Exhibit 6)

January 6, 1956

Foster & Meadows
Law Offices
Penobscot Building
Detroit 26, Michigan

Re: Wisconsin & Michigan Steamship Company
Franchise Tax 1955

Gentlemen:

It appears that the above named corporation had no intrastate commerce in Michigan during the period covered by the 1954 Annual Report, and that it is substantially in the same position as was Gartland Steamship Company with regard to activities in Michigan.

Relying upon the Gartland case and the decision in *Spector Motor Service, Inc. v. O'Connor*, 340 U. S. 602, 71 S. Ct. Rep. 508; the Commission determines to accept the Report as filed and determine the tax as paid.

Yours very truly,
James C. Allen,
Commissioner

JCA:ed

APPENDIX F

(Exhibit 14)

Corporation
AM:ed
September 14, 1955

Wisconsin & Michigan Steamship Company
350 E. Plankinton Ave.
Milwaukee 3, Wisconsin

Gentlemen:

Your letter of September 9, 1955 received.

The ratio of tonnage received and discharged in Michigan to the total tonnage received and discharged is .49860.

The privilege fee is figured on the paid in capital of $232,200 and surplus of $2,510,741 at the rate of 4 mills on the dollar which results in $5,470.52 plus a filing fee of $2.00 for a total of $5,472.52. Your remittance leaves a balance due the State of $5,460.52. Kindly remit.

Very truly yours,
Ann Sawasky, Director
Profit Annual Report

APPENDIX G

(Exhibit 15)

FOSTER & MEADOWS
Penobscot Building
Detroit 26

February 23, 1956

Michigan Corporation and Securities Commission
Lansing 4, Michigan

Gentlemen:

Wisconsin & Michigan Steamship Company
Franchise taxes for years 1952, 1953 and 1954.

This letter is written in furtherance of recent correspondence between the writer and James C. Allen, former Commissioner, Michigan Corporation and Securities Commission. We would particularly refer to our letter of October 3, 1955, addressed to the Commissioner and his letter to us under date of January 6, 1956, with respect to franchise taxes of Wisconsin & Michigan Steamship Company for the year 1955.

It is our understanding that Wisconsin & Michigan Steamship Company operated on the same basis for the years 1952, 1953 and 1954, and that there was an overpayment of franchise taxes for those years. We say this for the reason that it is our understanding that the company's entire business during the years 1952, 1953 and 1954 or for the tax periods covering those years was wholly interstate. That is to say, there was no traffic handled in intrastate commerce between points in the State of Michigan. It would appears therefore, that company is entitled to a refund for the overpayment of its taxes for the three years in question, as there was a tax due for each of those years of only $10 per year plus $2 filing fee for each year.

The company, accordingly, at this time requests a refund be set for the overpayment as disclosed by the books and records of the Commission, which we understand will show that taxes were paid as follows:

1952	$ 3,891.19
1953	4,389.03
1954	4,947.48
Total	$12,908.70

The amount which should have been paid for the three years was $10,365.92, leaving an overpayment of $2,542.78.

If this letter cannot be considered as an application for refund, we would appreciate being supplied with proper forms for that purpose.

Awaiting your early advices, we remain

Very truly yours,

FOSTER & MEADOWS

By: Sparkman D. Foster

APPENDIX H

(Exhibit 16)

MICHIGAN CORPORATION AND SECURITIES COMMISSION

Corporation
AM
March 13, 1956

Mr. Sparkman B. Foster
Foster & Meadows
Penobscot Building
Detroit 26, Michigan

Re: Wisconsin & Michigan Steamship Company

Dear Mr. Foster:

We indicated in our letter of February 27, 1956, that the matter has been referred to Mr. William D. Dexter, Assistant Attorney General.

Please be advised that your letter of February 29, 1956, will be taken as an application for refund under Section 16, Act 265, Public Acts 1931 as amended by Act 15, P.A. Acts of 1945, on the 1955, 1954 and 1953 reports. The law requires that you file requests for refunds on the 1952 report, as provided by statute.

Supplemental reports will be required for the three years mentioned. Since this matter is to be handled by the Department of the Treasury, Income Tax Division, we have forwarded your letter to that office for their consideration and will be advised at this time.

Very truly yours,

Arthur Sawicki

Executive Assistant Director

APPENDIX I
(Exhibit 36)

May 10, 1960

Mr. Sparkman D. Foster
Foster, Meadows & Ballard
4372 Penobscot Building
Detroit 26, Michigan

Re: Wisconsin & Michigan Steamship Company

Dear Mr. Foster:

Your petition for refunds in accordance with Section 10, Act 85, P.A. 1921, as amended, of the 1952, 1953 and 1954 Annual Reports and your petitions under Section 5(e), Act 85, P.A. 1921, as amended, for adjustment of the allocation factor to be used in computing 1956, 1957, 1958, and 1959 franchise fees have been considered.

Michigan Annual Reports for the years 1956, 1957, 1958, and 1959, have been submitted by the corporation with payment of a $12.00 fee for each year, using zero as the apportionment ratio because its vessels travel between Muskegon, Michigan, and Milwaukee, Wisconsin, with no intermediate stops.

The corporation voluntarily qualified to do business in Michigan and while it remains qualified is required to pay an annual fee for the privilege of exercising that privilege, based on its activity. The statute provides that the fee for a carrier by water shall be computed on the portion of paid-in capital and surplus represented by the ratio of tonnage of revenue passengers and revenue cargo received or finally discharged in Michigan to the total of such tonnage so received and so discharged everywhere. There has been no showing by the corporation that this

formula reaches an unreasonable or discriminatory result and the fee has been determined by this Commission, using the statutory formula as follows:

Year	Ratio	Privilege & Filing Fee	Paid	Balance Due
1956	.498832	$6,345.17	$12.00	$ 6,333.17
1957	.498634	6,972.87	12.00	6,960.87
1958	.498503	7,623.56	12.00	7,611.56
1959	.498156	8,037.30	12.00	8,025.30
TOTAL				$28,930.90

Payment of this amount is requested.

With regard to the request for refund on the 1952 report, this Commission finds that more than three years had elapsed from the date of such alleged overpayment, and the request is therefore denied. This Commission finds further that there is no basis for refund of all fees above $12.00 paid by the corporation for the years 1953 and 1954, as outlined in your petition dated February 23, 1956, and this request is also hereby denied.

Very truly yours,
Lawrence Gubow
Commissioner.

LG:pl
cc: Wisconsin & Michigan Steamship Company
350 N. Plankinton Avenue
Milwaukee 3, Wisconsin
Annual Reports Division

Office Supreme Court, U.S.
FILED
FEB 5 1964
JOHN F. DAVIS, CLERK

No. 730

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1963

WISCONSIN & MICHIGAN STEAMSHIP COMPANY,
Petitioner,

vs.

CORPORATION AND SECURITIES COMMISSION,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

FRANK J. KELLEY
ATTORNEY GENERAL

Robert A. Derengoski
Solicitor General

T. Carl Holbrook and
William D. Dexter
Assistant Attorneys General

The Capitol
Lansing, Michigan

SPEAKER-HINES AND THOMAS, INC., STATE PRINTERS, LANSING, MICHIGAN — 1964

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1963

WISCONSIN & MICHIGAN STEAMSHIP COMPANY,
Petitioner,

vs.

CORPORATION AND SECURITIES COMMISSION,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN[1]

Respondent opposes the petition for writ of certiorari from the judgment entered by the Supreme Court of Michigan on September 4, 1963, in the case of *Wisconsin & Michigan Steamship Company*, Petitioner-Appellant, v. *Corporation and Securities Commission*, Respondent-Appellee, 371 Mich 61, which judgment affirmed the opinion and order of the Michigan Corporation Tax Appeal Board of January 25, 1962, on the following grounds:

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[1] Unless otherwise plainly indicated, numbers in parentheses refer to pages of the Petition for Writ of Certiorari to the Supreme Court of the State of Michigan; and numbers in parentheses followed by "a" refer to pages of Appendix for Appellant filed in the Michigan Supreme Court.

1. The only federal question sought to be raised by the petition has been conclusively adjudicated by this Court contrary to petitioner's position.

2. The petitioner has not properly raised any federal question.

3. The judgment of the Supreme Court of Michigan is conclusive.

OPINIONS BELOW

The opinions of the Court below and of the Michigan Corporation Tax Appeal Board, and references thereto, are correctly set forth by petitioner (2, 30-41).

JURISDICTION

The petitioner attempts to invoke jurisdiction of this Court under 28 U.S.C. § 1257 (3). For the reasons set forth herein, the petition should be denied.

STATUTES INVOLVED

The statute involved is correctly set forth by petitioner in Appendix "C" to its petition (43-45) and is properly referred to by petitioner (3-4), except that Section 5e of Act No. 85 of the Michigan Public Acts of 1921, as amended,[21] is applicable in adjusting the apportionment formula provided in other sections of said act only.

"If it shall appear on the application of the taxpayer

---

[21] CLS § 450.305e; MSA § 21.208(5).

or otherwise that an allocation factor determined pursuant to this act does not properly reflect the activity, business, receipts and capital of a taxpayer reasonably attributable to the state * * *" (45)

Respondent disagrees with petitioner's statement that it did not compl with the state statutory provisions, which question is purely one of state law, posing no federal question. Furthermore, Section 5e has no application in this cause for the reason that petitioner did not attempt to bring its apportionment problem within the scope of the Section 5e provision.

The statute was construed as follows by the Court below:

"Michigan's annual franchise fees are imposed alike upon domestic corporations and foreign corporations admitted to do business within the State. Corporations, both domestic and foreign, not maintaining a regular place of business outside this State, other than a statutory office, paid, during the period here in controversy, an annual privilege fee of 4 mills upon each dollar of their entire paid-up capital and surplus. Except for certain classes of carriers, of which appellant is one, other corporations are required to pay annual franchise fees measured by that proportion of their paid-up capital and surplus attributable to Michigan in accordance with an apportionment formula known as the Massachusetts formula. The annual franchise fees of motor carriers of property and all carriers by water, such as appellant, whether domestic corporations or foreign corporations admitted to do business in Michigan, are measured by the apportionment formula set forth in the margin. This formula provides for the allocation of a portion of the carrier's

paid-up capital and surplus to Michigan, and thereby subject to Michigan's 4 mill franchise fee rate, in proportion to the ratio which the carrier's total tonnages of revenue passengers and cargo received or discharged within Michigan bears to its total tonnages received and discharged everywhere. (31-32).

* * *

"Michigan's corporate franchise fee is not an *ad valorem* tax on property, nor is it an income tax, a gross receipts tax nor a sales tax. Keeping in mind what Michigan's franchise fee is not, it may be conceded that the State may not otherwise impose a charge upon appellant for the privilege of doing an interstate business in Michigan. * * * (33-34)

* * *

"The fee charged is for the privilege granted, as the legislature itself has stated, 'irrespective of whether any such corporation chooses to actually exercise such privilege during any taxable period.' CLS 1956, § 450.304 (Stat. Ann. 1959 Cum. Supp. § 21.205). See *Holland Hitch Company* v. *State of Michigan*, 318 Mich. 474, 479.

"It is not the privilege to do interstate business in Michigan for which appellant applied to the State and for the grant of which the State seeks to charge it an annual fee. Its right to engage in such interstate business in Michigan is not subject to the State's grant or denial. Appellant sought, and was granted, the privilege to do *intrastate* business in Michigan. * * *" (34-35)

QUESTIONS PRESENTED

Petitioner's petition for writ of certiorari does not properly state any federal question. Respondent believes the only possible federal question to be:

> Can the State of Michigan measure a corporate privilege tax imposed on foreign corporations for the privilege of doing or being able to do business in this State by reference to the total business done within this State, irrespective of whether it is characterized as "interstate", "intrastate", or "foreign" in nature, or must it measure its local privilege fee solely by reference to intrastate activities of the foreign corporation within the State?

As stated in the language of the Supreme Court of Michigan in its opinion:

> "The only meritorious issue before us is whether Michigan may determine the amount of such privilege fee by reference to appellant's total business transacted in Michigan which, for our purposes we may assume, as appellant claims, was solely interstate in character, or whether it may be charged a franchise fee in excess of the $10 minimum fee provided by the statute only when it actually conducts intrastate business in Michigan and then by reference only to such intrastate business." (36)

The above issue, as quoted by the lower Court, was stated by petitioner thusly for the Court below:

> "* * * does the inclusion of cargoes loaded and unloaded in Michigan ports and transported solely and exclusively in interstate commerce violate the Com-

merce Clause (Article I, Section 8) of the Constitution of the United States?" (41)

In reference to this issue, the lower Court correctly stated petitioner's claim to be (32-33)

> "* * * that inasmuch as it engaged solely in interstate commerce in Michigan, the annual franchise fee claimed from it by the State, determined in accordance with the statutory formula which takes into account appellant's interstate tonnages, constituted a direct burden by the State on interstate commerce in contravention of the commerce clause of the Federal Constitution, Art. 1, § 8. Relying upon *Gurtland Steamship Company* v. *Corporation & Securities Commission*, 339 Mich. 661, and *Panhandle Eastern Pipe Line Company* v. *Corporation & Securities Commission*, 346 Mich. 50, appellant argues that none of its interstate passenger and cargo tonnages should have been considered in computing the apportionment factor to be applied to its paid-up capital and surplus for determining what portion thereof was subject to the 4 mill franchise fee rate. Since appellant's entire business in Michigan, according to its view, was in interstate commerce, it contends that none of its tonnage properly could be taken into account and that the apportionment factor under such circumstances should have been zero. That result, of course, would have relieved appellant of all liability under the statutory formula (although appellant concedes liability for the annual $10 minimum fee required by CLS 1956, § 450.304, [Stat Ann 1959 Cum Supp § 21.205].[5] * * *

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5. "Implicit in appellant's concession of liability for the annual $10 minimum franchise fee is its recognition that the State properly may charge some fee, at least

when the franchise granted was voluntarily sought, whether or not it was actually exercised."

STATEMENT OF THE CASE

Respondent cannot accept petitioner's statement of the case as relevant to the federal question sought to be raised. Facts pertaining to this question are set forth in the opinion of the Court below, as follows (30-31):

> "Appellant steamship company is a Wisconsin corporation carrying passengers, automobiles and other freight across Lake Michigan between the ports of Milwaukee, Wisconsin and Muskegon, Michigan. In 1941, *upon its own application*, it was admitted to do intrastate business within Michigan. From 1952 through 1959, it filed the annual reports required by law to be filed with the corporation and securities commission by every domestic and foreign profit corporation granted the privilege of doing such business within this State. Section 4 of PA 1921, No. 85, as amended (CLS 1956, § 450.304 [Stat Ann 1959 Cum Supp § 21.205]). This appeal from the corporation tax appeal board concerns the amount due the State during those years (except 1955) as appellant's annual franchise fee payable at the time of filing its annual reports.
>
> "Appellant does not claim that the State seeks to impose a tax upon it, a foreign corporation, for the privilege of conducting its interstate business in Michigan. Nor does the State claim in this case that it could do so lawfully. Instead, appellant *voluntarily* applied for admission to do business locally within this State and was granted that privilege. While appellant concedes the State may charge it the statutory minimum

> fee of $10 annually for the local privilege granted notwithstanding its professed failure to date to exercise the granted privilege, it denies the State's right to charge it a privilege fee based upon any formula which takes into account any of the appellant's interstate business. Appellant and the State spend considerable effort in arguing whether appellant's activities in Michigan constitute exercise of its local privilege. Were this a case in which the State sought to compel appellant to qualify for admission and to pay a privilege fee therefor on the ground that its activities in Michigan constituted local business, we would be required to resolve the parties' argument. However, this is not such a case. Appellant does not deny that it is liable for some fee for its voluntarily acquired privilege, whether exercised or not. The only question is its amount and the answer to that question *does not* depend upon whether or to what extend appellant engages in what may be called purely local business."

Because of petitioner's voluntary action in qualifying to conduct an intrastate business in Michigan, and since the amount of a local fee is not dependent upon the amount of intrastate business as contrasted to interstate business conducted within the State, the Court below found

> "* * * it is not necessary to review the corporation tax appeal board's finding that appellant was engaged in such intrastate business during the periods involved in this appeal." (41)

However, the Corporation Tax Appeal Board [whose findings of fact are controlling if supported by competent evidence: *Udility Corp.* v. *Corp. & Sec. Comm.*, 319 Mich 1; *Duluth, South Shore & Atlantic RR Co.* v. *Corp. & Sec. Comm.*, 353 Mich 636] specifically found that

> "The appellant conducts sales and renders services upon its boats within the territorial waters of Michigan, in Muskegon Lake and at the dock; it maintains and keeps in repair a sign in Muskegon directing passengers to the dock, and gathers passengers and freight throughout the state by the employment of 'independent agents.' Publicity is given the appellant's transportation services and vessels by its agents and the listing of appellant in telephone directories in the larger cities of the state. For the calendar years 1953 through 1957, which constitute the periods covered by appellant's Annual Reports of 1954 through 1958, appellant itself maintained a passenger ticket office during the travel season which was staffed by two of its employees." (90a)

Notwithstanding its reliance on Section 5e of Act 85 of the Michigan Public Acts of 1921, as amended, petitioner has never requested from the respondent a redetermination of its franchise fees for the years in question. It did not furnish the information required under the statute with its annual reports for the years 1956, 1957, 1958 and 1959 (50a-53a). Further, petitioner has furnished no evidence to establish that the apportionment formula contained in 5e of Act No. 85 of the Michigan Public Acts of 1921, as amended,[3] attributes to the State of Michigan an unreasonable portion of petitioner's paid-up capital and surplus, assuming that the State of Michigan is permitted, as a matter of law, to measure a corporate privilege fee by the activity or business done within its territorial limits, irrespective of whether that business or activity is denoted intrastate, interstate, or foreign in character.

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[3] CLS § 450.305e; MSA § 21.298(3).

The State of Wisconsin does not levy an annual franchise fee upon corporations. Instead, it levies a tax upon net income derived from activities attributable to the State of Wisconsin. The Wisconsin statute provides for apportionment of income of a carrier by water engaging and qualified to engage in transportation both within and without Wisconsin. The apportionment is based upon the ratio of the number of miles traveled by a taxpayer's vessels in Wisconsin waters to the total number of miles traveled. Since, in the instant case, 45.88% of petitioner's water routes are in Wisconsin waters (81a), the State of Wisconsin deems 45.88% of the net income earned by petitioner to be attributable to Wisconsin.

By its own choice, petitioner has qualified itself to carry on business within the State of Michigan from 1951 to date; and for the years 1952 through 1954, petitioner voluntarily paid the amount of fees in accordance with the statute, but, while voluntarily keeping alive its qualifications to do business in this State as a foreign corporation for the years 1956 through 1959, petitioner paid only a fee of $10.00 plus $2.00 filing fee each year for this privilege. (9a)

ARGUMENT

1.

The commerce clause is not violated by the inclusion in the Michigan portion of the apportionment formula, for the purpose of measuring the appellant's annual privilege fee, of cargoes and passengers loaded and unloaded in Michigan ports, irrespective of whether this activity is connected with "intrastate" or "interstate" transportation.

Petitioner's argument to the contrary notwithstanding,

examination of the briefs filed in the Court below indicates that the only substantive issue sought to be raised by the petitioner is the ability of the State of Michigan to include within a corporate privilege tax **measure** a reasonable portion of petitioner's paid-up capital and surplus attributable to its total business done within this state, whether characterized as interstate, foreign or intrastate in nature.

Petitioner would raise here for the first time, questions concerning the reasonableness of that portion of its paid-up capital and surplus attributable to Michigan being used as a measure of its total business done within the state and the jurisdiction of the State of Michigan to impose the privilege tax in question because it alleges its activities are wholly interstate.

On page 11 of its brief before the Court below, the petitioner asserts that

> **"The controversy between appellant and the Commission arises over the manner in which the 'annual privilege fee' (franchise fee) due the State of Michigan for the years in question shall be computed. • • •"** (Emphasis supplied)

By reliance upon *Gartland Steamship Co.* v. *Corporation & Securities Commission*, 339 Mich 661, the petitioner takes the position that, as a matter of law, it is entitled to exclude from the in-Michigan portion of the Section 5c apportionment formula its total loadings and or unloadings in Michigan, which represent cargo or passengers either originating from sources without this State or having a destination without the State. Petitioner concludes that all its loadings and unloadings are of this nature and, therefore, the exclusion of this so-called "interstate commerce" business

in the Section 5c formula would result in a zero tax being due.[4]

Petitioner did not contend that the Section 5c formula, as applied to it, allocates or apportions to Michigan an unreasonable portion of its total business done or activities carried on within this state. Rather, petitioner contended that the State of Michigan cannot measure the corporate privilege fee by reference to the activities done or capital used in this state in furtherance of petitioner's "interstate business".

Further, petitioner did not rely upon any facts peculiar to it that would make the Section 5c formula unreasonable as applied to it, as compared to other carriers. It based its argument on the proposition that the formula is invalid as applied to all carriers. Petitioner has made no application for adjustment of its fees pursuant to Section 5e.

Petitioner's position in this cause is reasonably stated on page 22 of its brief in the Court below, as follows:

> "• • • as computed, the franchise tax is not related to appellant's taxable activities within the State for there were none. • • •"

And at page 23:

> "• • • The inclusion, therefore, of tonnages which are without question interstate in nature clearly renders

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[4] Nevertheless, the petitioner assumes that it is to pay a $10 fee (17). (If this flat rate minimum were $1,000 or $10,000, would petitioner still assume it should pay that amount?)

the application of the formula arbitrary and unreasonable, if not unconstitutional."

Thus, the only substantial federal question sought to be raised by the petitioner has been unequivocally answered by this Court on several occasions where it has expressly held that a local privilege tax could be measured by the total business done within the taxing jurisdiction irrespective of whether the activity is related to intrastate, interstate or foreign business.

U. S. Glue Co. v. *Oak Creek*, 247 US 321, held that a state could impose its general income tax on net income derived from transactions in interstate commerce without contravening the commerce clause.

Atlantic & Pacific Telegraph Co. v. *Philadelphia*, 190 US 160, 163, held that

"• • • the franchise of a corporation, although that franchise be the business of interstate commerce, is, as a part of its property, subject to state taxation. • • •"

In the same vein, it was stated in *Hump Hairpin Co.* v. *Emmerson*, 258 US 290, 294, that

"• • • taxes have been so repeatedly sustained where the proceeds of interstate commerce have been used as one of the elements in the process of determining the amount of a fund • • • to be assessed, that the principle of the cases so holding must be regarded as a settled exception to the general rule. • • •" (Emphasis supplied)

This principle was stated thusly in *International Shoe Co.* v. *Sharfel*, 279 US 429, 433:

> "• • • A franchise tax imposed on a corporation, foreign or domestic, for the privilege of doing a local business, if apportioned to business done or property owned within the state, is not invalid under the commerce clause **merely because a part of the property or capital included in computing the tax is used by it in interstate commerce**. (Cases cited)" (Emphasis supplied)

To the same effect are *Western Cartridge Co.* v. *Emmerson*, 281 US 511; *Matson Navigation Co.* v. *State Board*, 297 US 441; *Western Live Stock* v. *Bureau*, 303 US 250, 58 S Ct 546; *International Harvester Co.* v. *Evatt*, 329 US 416; and *Baltic Mining Co.* v. *Massachusetts*, 231 US 68, 82, 83, 87.

The principle that disposes of the petitioner's argument has been more recently stated by this Court in *Spector Motor Service, Inc.* v. *O'Connor*, 340 US 602, 609-610, as follows:

> "• • • where a taxpayer is engaged both in intrastate and interstate commerce, a state may tax the privilege of carrying on intrastate business and, within reasonable limits, **may compute the amount of the charge by applying the tax rate to a fair proportion of the taxpayer's business done within the state, including both interstate and intrastate.** • • •" (Emphasis supplied)

No authorities have been found to the contrary, and none have been cited for the contrary proposition by the petitioner.

Petitioner is relying upon the Michigan cases of *Gartland Steamship Co.* v. *Corporation & Securities Commission*, *supra*, 339 Mich 661, and *Panhandle Eastern Pipe Line Co.* v. *Corporation & Securities Commission*, 346 Mich 50, and those decisions of this Court that preclude a state from imposing a tax on the privilege of engaging in interstate commerce, to establish the proposition that the Michigan Supreme Court's decision violated the commerce clause. In relying on the *Gartland* and *Panhandle* cases, petitioner forgets that they were overruled on the principle upon which it is relying.

In citing the decisions that preclude state taxation of the privilege of engaging in interstate commerce, petitioner forgets that the Corporation Tax Appeal Board found that petitioner was doing a local business within this state; that such consideration is immaterial since the privilege to do an intrastate business was granted petitioner at its own request; and that it limited its complaint in this cause to the reasonableness of the measure of the privilege of doing an intrastate business in Michigan.

It is thus apparent that the federal question relied upon by the petitioner results from a distortion of the facts and circumstances of this cause and reliance upon decisions that are either immaterial, such as those concerning a state's power to tax the privilege of engaging in interstate commerce, or are not controlling, such as the Michigan decisions of *Gartland*, *supra*, 339 Mich 661, and *Panhandle*, *supra*, 346 Mich 50, that have been overruled for purposes material here by the Supreme Court of Michigan in the cases of *Cleveland-Cliffs Iron Company* v. *Corporation and Securities Commission*, 351 Mich 652; *Duluth, South Shore & Atlantic Railroad Co.* v. *Corporation & Securities Commission*, *supra*, 353 Mich 636; and *Wisconsin & Michigan*

Steamship Co. v. *Corporation & Securities Commission*, *supra*, 371 Mich 61.[15]

2.

Petitioner has not properly raised any federal question.

As above indicated, the sole question at issue is the reasonableness of the measure of the fee for petitioner's **privilege** of carrying on or being able to carry on intrastate business activity in Michigan for the years in question. Yet, as above indicated, petitioner attempts to make out a substantial federal question for review by this Court by asserting that the fee is unreasonable as related to its **business done** within the State of Michigan. However, it has not raised as a factual question the reasonableness of its fee in the proceedings before the respondent Commission, before the Michigan Corporation Tax Appeal Board, or before the Michigan Supreme Court. It chooses, however, on the basis of the *Gartland* and *Panhandle* decisions of the Supreme Court of Michigan, *supra*, to assert as a matter of law that capital or income related to its interstate activities within Michigan cannot be included as a

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[15]

The Court below quoted *Duluth, South Shore & Atlantic Railroad Co.* v. *Corporation & Securities Commission*, *supra*, 353 Mich 636, as follows in footnote 7 to its opinion (36):

"'Both *Gartland* and *Panhandle* opinions, however, relied upon *Cooney* v. *Mountain State T. & T. Co.*, 294 US 384 (55 S Ct. 477, 79 L ed 934), for constitutional authority. Both failed to distinguish between the direct taxation of *interstate* commerce (which *Cooney* ruled out) and the employment of an interstate-commerce factor in the formula for determining the amount of paid up capital and surplus to be allocated to Michigan in computing the fee to be assessed for doing intrastate business in Michigan.' 353 Mich. 636, at p. 665."

part of the measure of the Michigan corporate tax imposed on the privilege of doing or being able to do an intrastate business.

Without the existence of this factual question — that is the reasonableness of the fee as related to the business done in Michigan by petitioner — petitioner has not brought itself within the purview of the apportionment decisions.

3.

The judgment of the Michigan Supreme Court is conclusive.

This Court has held on numerous occasions that it will not disturb findings or conclusions of fact of state Supreme Courts if supported by competent evidence; nor will it change the construction or operative effect given state taxing statutes if supported by the statutory language.

In the instant case, the Supreme Court of Michigan specifically found that the privilege tax in question was imposed on the privilege of doing or being able to do business in Michigan in a corporate capacity and, as applied to the petitioner, was not imposed on the exercise of the privilege of engaging in interstate commerce in Michigan. Furthermore, as a matter of fact, the Court below found that the petitioner, by voluntary application, was in position to exercise its intrastate business privileges in Michigan for the period covered by the fees in question.

The lower Court also found that the apportionment formula reasonably apportioned petitioner's paid-up capital and surplus to Michigan.

This construction of the Michigan law and findings of fact by the Court below make its opinion conclusive.

CONCLUSION

The petitioner premises its right to a review by this Court on the following proposition;

> "• • • it is petitioner's position that the state, through its legislative agency, respondent here, is prohibited by the Commerce Clause from including receipts or property derived from or used in interstate commerce in the formula used to measure a corporate privilege fee for a foreign corporation who has qualified to do business within a state. • • •" (19)

As above indicated, this Court has unequivocally held on numerous occasions that receipts or income derived from, or property used in, interstate commerce may be included in the measure of a state corporate privilege fee.

It is crystal clear that petitioner does not seek to have this Court review any federal question that it has not already conclusively disposed of in numerous prior decisions and, therefore, petitioner's appeal is without merit.

Furthermore, the Supreme Court of Michigan's construction of a Michigan privilege fee imposed by Act 85 of the Michigan Public Acts of 1921, as amended, and its findings concerning the relationship of petitioner's activities in Michigan as pertains to that fee leave petitioner's argument completely unsupportable.

RELIEF

It is therefore respectfully requested that this Honorable Court deny the petitioner's Petition for Writ of Certiorari to the Supreme Court of the State of Michigan.

Respectfully submitted,

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Lansing, Michigan

January 31, 1964.

FEB 12 1963
JOHN F. DAVIS, CLERK

No. 730

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

WISCONSIN & MICHIGAN STEAMSHIP COMPANY,
Petitioner

vs.

CORPORATION AND SECURITIES COMMISSION,
Respondent

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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CASES AND AUTHORITIES CITED

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For the purpose of this Reply Brief petitioner will reply to the headings used by respondent in its Brief in Opposition to Petition for Writ of Certiorari.

STATUTES INVOLVED

Here it is stated on page 3:

> "Respondent disagrees with petitioner's statement that it did not comply with the state statutory provisions, which question is purely one of state law, posing no federal question. Furthermore, Section 5e has no application in this cause for the reason that petitioner did not attempt to bring its apportion-

ment problem within the scope of the Section 5e provision."

As pointed out in petitioner's application for refund for the years 1952, 1953 and 1954, Appendix "G"[1], application for redetermination for the year 1955, in the proceedings before the Corporation Tax Appeal Board, and in the Court below, it has been claimed that Section 5c, by its very terms, laid an undue burden on interstate commerce. The formula of the section provides the annual franchise fee shall be measured by that portion of the corporation's paid-up capital and surplus as the sum of the tonnage of revenue passengers and revenue cargo first received or finally discharged by the carrier within this state is to the total of such tonnage so received and so discharged by such carrier within and without this state. Respondent has applied this formula irrespective of the wholly interstate nature of petitioner's business activities and utter lack of any intrastate business. The Supplemental Annual Reports for 1952, 1953 and 1954, Appellant's Exhibits 1A, 2A and 3A, as well as the Annual Report for the year 1955, on which the then commissioner of the Corporation and Securities Comm ission affirmed the position of petitioner, Appendices "D" and "E," and the Annual Reports for the subsequent years 1956, 1957, 1958 and 1959, Appellant's Exhibits 7, 8, 9 and 10, clearly show that petitioner engaged wholly in interstate commerce between Michigan and Wisconsin and that no intrastate business was conducted.

Section 5e *directs* the Commission to adjust the formula of Section 5c if it does not properly reflect the activity, business, receipts and capital of a taxpayer reasonably attributable to the state. Here petitioner engaged in no intra-

[1]Where appendix or appendices are referred to by capital letter in quotes they are the appendices to petition for writ of certiorari.

state business whatever, its business being wholly interstate commerce. In applying therefore Section 5c without reference to or use of Section 5e there can be but one inescapable conclusion, namely, it is *only* the interstate business of petitioner which is being made the basis of the tax. Petitioner has repeatedly stressed this fact and it is a misstatement to argue that petitioner has never attempted to bring its apportionment problem within the scope of the 5e provision.

QUESTIONS PRESENTED

We believe the quotation from the opinion of the Supreme Court of Michigan, page 5 of respondent's brief, demonstrates that a federal question and the constitutionality of Section 5c of the Act as interpreted by the Commission and the Corporation Tax Appeal Board was before the court below inasmuch as the court did state that for the purpose of its decision it would assume, as petitioner, appellant below, claimed, that its total business transacted in Michigan was solely interstate in character. The Supreme Court of the State of Michigan in *Gartland Steamship Company* v. *Corporation and Securities Commission*, 339 Mich. 661 ruled that in arriving at the paid-up capital and surplus reasonably attributable to Michigan, the Commission would necessarily have to exclude wholly interstate commerce. The court said at page 672.

> "The commission's construction of PA 1921, No. 85, as amended by PA 1952, No. 183 (CL 1948, and CLS 1952, § 450.301 et seq. (Stat Ann and Stat Ann 1963 Cum Supp § 21.201 et seq.)), that it had the right to include tonnage transported in interstate and foreign commerce is contrary to the due process clause of the 14th amendment."

STATEMENT OF THE CASE

Here respondent states that it cannot accept petitioner's statement of the case as relevant to the question sought to be raised and then proceeds to quote at page 7 of its brief that portion of the opinion of the court below where it states:

> "Appellant does not claim that the State seeks to impose a tax upon it, a foreign corporation, for the privilege of conducting its interstate business in Michigan. Nor does the State claim in this case that it could do so lawfully."

Petitioner, appellant below, has claimed from the time it asked for a redetermination of its tax for the year 1955 that the State, or respondent, sought to impose a tax upon it, a foreign corporation, for the privilege of conducting its interstate business in Michigan and the State, or respondent, has claimed it could lawfully do so. This was stressed in petitioner's application for a rehearing which the court below denied. Petitioner respectfully directs the attention of the Court to petitioner's appendices "D," "E" and "F."

At page 8 of its brief respondent quotes as follows from the opinion of the court below:

> "* * * it is not necessary to review the corporation tax appeal board's finding that appellant was engaged in such intrastate business during the period involved in this appeal"

and then proceeds to argue that the Corporation Tax Appeal Board's findings were controlling. It is well to note however, that the court below, as previously pointed out, accepted petitioner's contention that all of its business was interstate for the purpose of its decision and therefore respondent's argument pertaining to the findings of the Corporation Tax Appeal Board is irrelevant and immaterial.

With respect to the statement on page 9 that petitioner never requested a redetermination of its franchise fees for the years in question, such is manifestly untrue. Petitioner petitioned for a refund for overpayment of the taxes for the years 1952, 1953 and 1954, Appendix "G," and furnished all information requested by respondent for the years 1956, 1957, 1958 and 1959 and never knew until receipt of Appendix "I" that those years were even under consideration by the commission as petitioner had paid the same tax for those years as had been accepted by the commission for the year 1955. From a reading of the transcript of Miss Sawasky's testimony quoted at pages 8, 9 and 10 of the petition, the commission presumably made a redetermination on its own initiative under Section 5c without any reference whatever to the mandate of Section 5c for the years 1956, 1957, 1958 and 1959 and with total disregard of the court's decision in the Gartland case, supra.

At page 9 of respondent's brief in opposition it is stated:

> "Further, petitioner has furnished no evidence to establish that the apportionment formula contained in 5c of Act No. 85 of the Michigan Public Acts of 1921, as amended, attributes to the State of Michigan an unreasonable portion of petitioner's paid-up capital and surplus, assuming that the State of Michigan is permitted, as a matter of law, to measure a corporate privilege fee by the activity or business done within its territorial limits, irrespective of whether that business or activity is denoted intrastate, interstate or foreign in character."

Within this statement of respondent lies the crux of the problem for it *cannot* be assumed that the State of Michigan is permitted, as a matter of law, to measure a corporate privilege fee by the activity or business done within its territorial limits, irrespective of whether that business or

activity is denoted intrastate, interstate or foreign in character.

The cases refuting this bold statement by respondent are legion. See *Cheney Bros. Co.* v. *Mass.*, 246 U. S. 147; ***Alpha Portland Cement Co.*** v. ***Mass.***, 268 U. S. 303; *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555; *East Ohio Gas Company* v. *Tax Commission of Ohio*, 283 U. S. 465; ***American Barge Line Company*** v. ***Koontz***, 68 S.E. (2nd) 56; *Cooney* v. *Mountain States Telephone & Telegraph Co.*, 294 U. S. 384 all cited and discussed at length at pages 22, 23, 24 and 27 of the Petition for Writ of Certiorari.

The rule governing the case now under consideration was clearly stated in *Commission of Corporation & Tax'n* v. *Ford Motor Co.*, 308 Mass. 558, 33 NE(2) 318:

> "A state is without power to tax a foreign corporation for the privilege of engaging in interstate commerce, or to exact an excise from a foreign corporation that conducts only an interstate business within the state."

Again, as previously stressed, the business or traffic of petitioner was wholly interstate and Section 5e of the Act is mandatory and the formula under that act produced no tax. Accordingly, the minimum tax provided in Section 4 was applicable. When the facts disclosed that a franchise tax has been assessed which is clearly in violation of the Constitution, Article 1, Section 8, as a franchise tax on petitioner's interstate commerce this is all the evidence required.

With respect to laws of the state of Wisconsin there was no evidence or proof in this respect either before the Corporation Tax Appeal Board or the court below and it is not relevant nor material to the issues here involved.

REASONS FOR DISMISSING THE WRIT

I

"The Petitioner does not present a substantial federal question."

Certainly the constitutionality of the statute, Section 5c, was before the court below as was the question as to whether or not the court's interpretation of the statute placed an undue burden on interstate commerce under the federal constitution. In the cases cited by respondent at pages 13 and 14 respondent overlooks one salient factor and, that is, a taxpayer must be engaged *both* in interstate and intrastate commerce to permit a state to compute its franchise tax for the privilege of carrying on intrastate business upon both interstate and intrastate commerce. No case to petitioner's knowledge has gone so far as to permit a state to compute the franchise tax on wholly interstate commerce. This is the very situation the Commerce Clause prohibits. In petitioner's case here the court below accepted, as mentioned above, petitioner's claim it engaged wholly in interstate commerce. Despite this clear and unequivocal statement, the court proceeded to uphold the franchise tax which in this instance is based solely and completely upon petitioner's interstate commerce.

In citing the *Spector Motor* case, 340 U.S. 602, at page 14 of its brief, respondent cites only that portion of the case which appears to support its position. The true holding of the case, however, is set forth at page 609 where the court stated:

> "This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was exclusively interstate in character."

And at page 610:

> "In this field there is not only reason but long-established precedent for keeping the federal privilege of carrying on exclusively interstate commerce free from state taxation. To do so gives lateral support to one of the cornerstones of our constitutional law—*McCulloch* v. *Maryland, supra.*"

At the bottom of page 14 of respondent's brief in opposition it is stated:

> "No authorities have been found to the contrary, and none have been cited for the contrary proposition by petitioner."

The cases cited in respondent's brief are not in point nor is the quotation from the Spector Motor Service, supra. Much to the contrary the basic decision of the Spector Motor case supports petitioner's position in every respect. Petitioner did cite the *Gartland case*, supra, in which the Supreme Court of the State of Michigan said at page 674:

> "It is the opinion of this Court that by the enactment of PA 1962, No. 183, § 5e (CLS 1952, § 450.305e (Stat Ann 1953 Cum Supp § 21.208(5)), the legislature gave to the commission the right and duty to apply a method of determining Gartland's tax 'calculated to effect a fair and proper allocation according to the receipts, activity, business and capital reasonably attributable to this State.'
>
> "The order and opinion of the corporation tax appeal board affirming the computation of the commission is reversed, and the commission is directed to recompute the annual privilege fee of Gartland Steamship Company, a Delaware corporation, excluding any and all cargoes transported in interstate and foreign commerce."

Until the instant case was before the Supreme Court of

the State of Michigan no other case except the Gartland case involved a water carrier or a foreign steamship company trading in and out of Michigan ports. The cases of *Gloucester Ferry Company* v. *Pennsylvania*, 114 U. S. 196 and *Puget Sound Stevedoring Company* v. *State Tax Commission*, 302 U. S. 90, which are particularly in point as they involve water transportation are discussed at page 24 of the Petition for Writ of Certiorari.

2.

"Petitioner has not properly raised any federal question."

The federal question raised is simply whether a state may base its franchise tax for the privilege of engaging in intrastate business solely upon commerce which is exclusively interstate in character.

As pointed out, petitioner did no intrastate business during the years in question and had it done any such business it would have paid whatever tax in excess of $10.00 that the formula of Section 5c as adjusted by Section 5e might have required.

The question under note 4, page 12, needs no reply as we are dealing with Section 4 of the statute which provides for a $10.00 minimum fee. The Court is not concerned with the imaginary fees or amounts mentioned in the footnote.

3.

"The judgment of the Michigan Supreme Court is conclusive."

If this argument were true then all of the prior decisions of this Honorable Court having to do with franchise taxes by a state on interstate commerce can be held for naught and the decision of any State Supreme Court would be final with respect to its interpretation of the state statutes concerning franchise fees on domestic or foreign corporations

and Article 1, Section 8 of the federal constitution would be nullified. The lower court made no findings that the apportionment formula reasonably apportioned petitioner's paid-up capital and surplus to Michigan unless its affirmance of the Corporation Board of Tax Appeals may be so considered. The Corporation Board of Tax Appeals upheld the franchise fees as assessed by the Corporation and Securities Commission under Section 5c of the Act which the Supreme Court of the State of Michigan had struck down in the Gartland case, supra, despite the uncontroverted proof that petitioner engaged in no intrastate commerce within the State of Michigan and that its business was 100 percent interstate commerce between the port of Milwaukee, Wisconsin and Muskegon, Michigan.

CONCLUSION

Respondent, on page 18, quotes in part from page 19 of the Petition for the writ of certiorari as follows:

> "* * * it is petitioner's position that the state, through its legislative agency, respondent here, is prohibited by the Commerce Clause from including receipts or property derived from or used in interstate commerce in the formula used to measure a corporate privilege fee for a foreign corporation who has qualified to do business within a state * * *"

In quoting petitioner's position above respondent omits this most important sentence which immediately follows the portion quoted:

> "This being particularly true where the foreign corporation is not engaged in any local or intrastate commerce within the State of Michigan."

Respondent further states at page 18 of its brief:

> "As indicated above, this court has unequivocally

held on numerous occasions that receipts or income derived from or properly used in, interstate commerce may be included in the measure of a state corporate privilege fee."

Petitioner stresses that in the cases where the above statement proves true, the taxpayer engaged in *both* intrastate commerce and interstate commerce. It is on this point that respondent's argument is fallacious.

Section 5c of the statute provides that the annual franchise fee shall be measured by that portion of the corporation's paid-up capital and surplus as the sum of the tonnage of revenue passengers and revenue cargo first received or finally discharged by the carrier within this state is to the total of such tonnage so received and so discharged by such carrier within and without this state. To arrive at the ratio referred to in the statute the following formula would apply:

$$\frac{\text{Total tonnage received and discharged in Michigan}}{\text{Total tonnage received and discharged within and without the state}} = \text{Average Ratio}$$

In applying the formula of Section 5c as the court below directed the commission to do in the Gartland decision, supra, petitioner's interstate commerce must be excluded and may not be used in arriving at the average ratio with which that portion of the corporation's paid-up capital and surplus is used to measure the privilege fee. Petitioner engaged solely in interstate commerce. As a consequence the "total tonnage received and discharged in Michigan (intrastate commerce) called for in the above formula would be zero.

Interstate commerce can be considered in the formula, but *only* in the denominator thereof, i.e., total tonnages received and discharged within and without this state.

The fallacy of respondent's position is in the manner in which it attempts to use petitioner's interstate commerce in the formula to compute the average ratio. If petitioner, as here, engaged in *no* intrastate commerce the result is that only the minimum fee of $10.00 as provided in the statute is assessable. To permit respondent to include petitioner's interstate commerce in the numerator of the formula which calls for only those tonnages "received and discharged in Michigan" (intrastate commerce) is clearly in contravention of the statute. To do so results in a tax based solely upon petitioner's *interstate* commerce and this has been expressly forbidden by the court below and this Honorable Court as clearly in violation of the Commerce Clause of the U. S. Constitution.

It is therefore respectfully requested that a Writ of Certiorari issue to the Supreme Court of Michigan.

February 11, 1964

Respectfully submitted

Sparkman D. Foster
Counsel for Petitioner,
Wisconsin & Michigan Steamship Company

John A. Mundell, Jr.
of Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 730

WISCONSIN & MICHIGAN STEAMSHIP COMPANY,
Petitioner,

against

CORPORATION AND SECURITIES COMMISSION,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

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CORPORATION AND SECURITIES COMMISSION,
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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioner prays that this Court grant rehearing of its order of February 17, 1964 denying the petition for a writ of certiorari, and that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Michigan in the above-entitled case as prayed for in the petition dated January 7, 1964, herein.

Reasons for Granting Rehearing and Issuing the Writ.

1. To impose a substantial tax for the privilege of doing local business in Michigan would deprive Petitioner of its property without due process of law in violation of the Fourteenth Amendment, where Petitioner is engaged solely in interstate commerce and has left unexercised its privilege to engage in local business.

The court below has explicitly held that the Michigan statute here in question, Section 4 of P. A. 1921, No. 85 as

amended (Petition,* App. C, pp. 43-45), imposes a fee for the privilege of exercising a local franchise (Petition, App. A, p. 34) and that this fee may be imposed even where, as in this case, a foreign corporation engaged solely in interstate commerce has in fact not exercised its privilege to do local business (id. p. 31). While denying that Michigan seeks to tax the privilege of doing interstate business in Michigan (id. pp. 30-31), the court below nevertheless has asserted that its tax on the unexercised local franchise may be measured by the amount of capital and surplus which is devoted to interstate commerce and which is *not* devoted to the exercise of the local franchise. The court below stated:

> "What Michigan says to the taxpayer, in effect, is this: 'Separate and apart from your unquestioned right to exercise your corporate franchises in interstate commerce within this State, without imposition by this State of a fee for the exercise of that right, you may also pursue your business within this State, in matters not involving interstate commerce, but only upon payment of a fee for that privilege. That fee will be measured by determination of that portion of your total paid-up capital and surplus *available* for such intrastate business, *whether or not the privilege actually is exercised by you*'." (id. pp. 38-39) (emphasis added).

Petitioner respectfully disagrees with the Michigan court and has argued in its petition for certiorari that the Michigan franchise fee is in fact a tax on interstate commerce and invalid under the commerce clause. We submit, however, that if Michigan has saved its statute from invalidity under the commerce clause by characterizing it as a fee for a local franchise, then Michigan has imposed

* Citations are to Wisconsin & Michigan Steamship Company's petition for certiorari, dated January 7, 1964.

a substantial exaction which is so unfair and so out of proportion to benefits conferred by Michigan as to deprive Petitioner of its property without due process of law. The vice of this tax is not just that it taxes an unexercised privilege but moreover that this tax is a substantial one measured entirely by capital and surplus devoted to an activity—interstate commerce—which Michigan's highest court even now states to be beyond the State's power to tax.

This Court has often reaffirmed that a tax violates the due process clause unless it is reasonably related to benefits conferred or to protection afforded by the State. In *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194 (1905) this Court restricted the reach of a state tax under the due process clause stating at p. 202:

> "The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, * * *."

See also *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444 (1940); *Northwest Airlines v. Minnesota*, 322 U. S. 292, 294 (1944); *Morton Salt Co. v. City of South Hutchinson*, 159 F. 2d 897, 901 (10th Cir. 1947). The requirement of a reasonable relationship between the tax imposed and benefits conferred by the State is particularly significant where, as here, the tax has been attacked as an undue burden on interstate commerce. Cf.: *Capitol Greyhound Lines v. Brice*, 339 U. S. 542, 544 (1950); *Ingels v. Morf*, 300 U. S. 290, 294 (1937).

We submit that in granting a privilege to engage in local business Michigan has conferred no benefits and no

protection for which it may impose a substantial tax, as long as that privilege is a dormant one, unexercised by the foreign corporation. Petitioner does not dispute the validity of the nominal $10 annual minimum fee or the $2 filing fee, bearing a reasonable relationship to administrative burdens assumed by the State, but a substantial tax based on assets devoted to purely interstate commerce, and not found to be within the State, is so grossly unfair as to deprive Petitioner of due process.

The Court has also made clear that a state may not, consistently with due process, impose a tax where the subject matter of the tax is beyond the state's tax jurisdiction. See e.g. *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, 210 (1930). This rule, furthermore, is applied by this court to franchise fees. The situation before this Court in *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1 (1910), was in many respects very similar to the case at bar. In that case Kansas had sought to impose a tax on the capital assets of a corporation as a condition for its doing a purely local business within the State. In invalidating this statute as inconsistent with the due process clause this court stated, at p. 38:

> "We need not stop to discuss at length the specific question whether the state can * * * make the property of the company, outside of Kansas, contribute directly to the support of its schools; such being the effect of the requirement that it pay into the state treasury * * * a given per cent of all its capital stock as a condition of its doing local business in Kansas. It is firmly established, that consistently with the due process clause of the Constitution of the United States, a State cannot tax property located or existing permanently beyond its limits."

Similarly in *Connecticut General Life Insurance Co.* v. *Johnson*, 303 U. S. 77, 82 (1938), this Court made clear that a state may not impose a franchise fee on a transaction for which no privilege or license from the state is needed. This Court has cautioned moreover that the value of the subject matter on which the tax is imposed must be determined with fair accuracy, for this Court stated in *Alpha Portland Cement Co.* v. *Massachusetts*, 268 U. S. 203, 218 (1925):

> "[D]etermination of real value with fair accuracy is essential. Many methods adapted to that end have been accepted, but this does not tend to support an excise laid on a foreign corporation on account of interstate transactions.
>
> "The local business of a foreign corporation may support an excise measured in any reasonable way if neither interstate commerce nor property beyond the State is taxed."

In *Alpha Portland Cement Co., supra*, the tax sought to be imposed was in many ways similar to the one here in issue. It required the Cement Company, a foreign corporation, to pay $5 per $1,000 of "corporate excess" employed by it within Massachusetts. The Company did have a small amount of property in Massachusetts, but the tax was imposed on its entire corporate excess apportioned in accordance with income earned there by virtue of interstate commerce activity in Massachusetts. This court sustained the Cement Company's attack, based in part on the Fourteenth Amendment, pointing out that the tax, even as allocated, did not measure the value of assets used within the State.

Similarly in *Wallace* v. *Hines*, 253 U. S. 66 (1920), this court invalidated an apportioned franchise tax, stating at p. 69:

> "The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the State. Therefore *no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and tangible way that it adds to the value of the road and the rights exercised in the State.* Hence the possession of bonds secured by mortgage of lands in other States, or of a land grant in another State or of other property that adds to the riches of the corporation but does not affect the North Dakota part of the road is no sufficient ground for the increase of the tax whatever it may be—whether a tax on property, or, as here, an excise upon doing business in the State." (Emphasis added).

It is clear that the statement in the court below that the value of the local franchise may be measured by assets "available" for use within the State under the local franchise, even if not so used, simply does not stand up under these past holdings of this Court. If the decision below is left undisturbed, we submit that every foreign corporation having substantial assets outside the State, but which could be used in activity under the local franchise, will be at the mercy of the taxing power of the State. If ever the "heel of the system" has been exposed to the "mortal dart", we submit that it has been so exposed here.

Under the rule stated by this Court in *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U. S. 590, 599 (1954), Petitioner's argument that

the Michigan tax is invalid under the due process clause was timely raised and preserved for review by this court. Although it did not explicitly frame its argument below as one arising under the due process clause, Petitioner sufficiently preserved this argument by stating at pp. 48-49 of its brief below:

> "Obviously the fee as computed by the Commission bears no reasonable relation to the privilege granted by the State, that of doing business in Michigan as a corporation."

This argument was just as explicitly rejected by the court below (Petition, Appx. A, p. 31).

2. The decision of the Michigan Supreme Court will directly affect many other foreign corporations similarly situated and will adversely affect a large segment of interstate commerce.

The court below has clearly held that Michigan can impose the annual franchise fee on the privilege of doing a local business and measure that fee by the corporate assets "available" for use in such local business, regardless of whether any local business is actually conducted under the franchise. This decision bears most heavily, of course, on corporations such as Petitioner which do an extensive interstate business within Michigan and have not exercised their local franchises. However, this decision will also affect corporations which do exercise privileges granted by their local franchises, because the measure of the fee under this decision has no relationship to the magnitude of the local activity (Id. p. 31).

There are now pending numerous cases before the Michigan Board of Corporate Tax Appeals, and there are other cases before Respondent herein, growing out of

franchise fee assessments for years going back as far as 1955 which will be affected by the ultimate disposition of the case at bar. Several cases involving water carriers holding Michigan franchises are listed in Appendix A to this petition.

It should not be necessary to point out to this Court the impact that the State court's construction of Michigan's annual franchise tax will have on interstate commerce. Michigan has the longest inland coastline of any state in the country and the greatest concentration of industrial wealth in the world. Having extensive coastlines on four of the five Great Lakes, it sits astride one of the principal inland waterways of the world. Clearly a state tax, even if designated a tax on the privilege of exercising a purely local franchise, which burdens interstate commerce, as argued in the petition for certiorari, will necessarily have an effect on the use of this great natural waterway.

The due process issue raised by Michigan's imposing a tax on an unexercised local franchise measured by assets used for purely interstate activity continues to be raised before this Court. Indeed there is presently pending before this Court another case raising a similar issue. *American Oil Company* v. *Neill* (Docket No. 701). The decision of the Supreme Court of Idaho, for which review is sought, had held that one of the factors giving the state a sufficient nexus to the transaction taxed was the existence of a dealer's permit authorizing the oil company to enter into the Idaho market as a distributor of motor fuels. 383 P. 2d 350, 360 (Idaho, 1963).

We submit that the Supreme Court of Michigan has decided an important question of federal law in a way which is not in line with the previous decisions of this court and in a way which will adversely affect an important segment of interstate commerce.

Conclusion.

For the reasons set forth above and in the petition for a writ of certiorari it is respectfully urged that rehearing be granted and that upon such rehearing a writ of certiorari issue to the Supreme Court of the State of Michigan.

Respectfully submitted,

HERBERT BROWNELL,
Counsel for Petitioner.

March 12, 1964.

Of Counsel:

WENDELL DAVIS, JR.
SPARKMAN D. FOSTER
JOHN MUNDELL, JR.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58 of the rules of this Court.

HERBERT BROWNELL,
Counsel for Petitioner.

APPENDIX A.

Taxpayer	State of Inc.	Years In Issue	Pending Before	Docket No.
Rockport S.S. Co.	Delaware	1955–1962	Comm.*	
Red Arrow S.S. Co.	Delaware	1955, 1956	Comm.	
		1957–1959	BTA**	60–4
		1960–1962	Comm.	
Reiss S.S. Co.	Delaware	1955, 1956	BTA	60–5
		1957–1959	BTA	60–9
		1960–1962	Comm.	
Wilson Marine Transit Co.	Delaware	1957, 1959–1961	BTA	62–2
Redland S.S. Co.	Delaware	1958, 1959	BTA	60–12
		1960, 1961	BTA	62–3
Tomlinson Fleet Corp.	Delaware	1956–1959	BTA	60–11
Oglebay Norton Co.	Delaware	1957	BTA	62–1
Gartland S.S. Co.	Delaware	1958–1963	Comm.	
Brown S.S. Co.	New York	1954–1958,	BTA	61–4
		1959–1962	Comm.	
American S.S. Co.	New York	1954–1959	Comm.	
		1960–1962	Comm.	
Amersand S.S. Co.	Delaware	1954–1959	Comm.	
		1960–1962	Comm.	

* Corporation and Securities Commission

** Michigan Board of Tax Appeals